Supreme Court, U.S.
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No. (1) OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. JEFFERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the indictment of a Member of Congress, although facially valid, should be dismissed when evidence privileged under the Speech or Debate Clause was used in the grand jury to obtain the indictment.

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William J. Jefferson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a[1]), is reported at 546 F.3d 300. The opinion of the district court (App. 36a-56a), is reported at 534 F. Supp.2d 645. The order of the district court (App. 34a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A timely petition for rehearing en banc was denied on December 12, 2008 (App. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (Westlaw through Jan. 2009).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

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[1] "App." refers to the appendix to this petition. "C.A. App." references are to the joint appendix in the court of appeals.

STATEMENT OF THE CASE

The Speech or Debate Clause is a unique constitutional provision that creates an absolute privilege for legislative activities within its scope. It protects legislators not only from conviction based on legislative acts, but also from having to defend themselves as a result of those acts.

This case presents an important Speech or Debate question that this Court has never expressly addressed, and on which there is a clear circuit conflict. It arises from Mr. Jefferson's motion to dismiss the bribery-related counts in the indictment against him on the grounds that the grand jury heard evidence describing privileged legislative activities that was directly relevant to those counts and supported the government's case. The trial court, which has jurisdiction over this criminal matter under 18 U.S.C. § 3231 (Westlaw through Jan. 2009), reviewed the evidence presented to the grand jury, but denied the motion to dismiss. Mr. Jefferson appealed that denial to the Fourth Circuit, which, pursuant to the collateral order doctrine and *Helstoski v. Meanor*, 442 U.S. 500 (1979), had jurisdiction under 28 U.S.C. § 1291 (Westlaw through Jan. 2009).

On appeal, the Fourth Circuit refused even to consider whether legislative evidence protected by the Speech or Debate Clause had been presented to the grand jury. Applying the general rule regarding facially valid indictments developed in cases involving the Fourth and Fifth Amendments, the court below held that it was "barred ... from looking behind an indictment to assess whether the grand

jury had considered privileged legislative materials." *United States v. Jefferson*, 546 F.3d 300, 313 (4th Cir. 2008); App. 28a. Because there was no facial challenge to the indictment here, the Fourth Circuit affirmed the denial of the motion to dismiss.

This holding is in direct conflict with the decisions of the D.C. Circuit, the Third Circuit and the Eleventh Circuit on this issue. Those circuits concluded that a court has the power to examine the evidence presented to a grand jury to determine whether the Speech or Debate Clause has been violated, and to dismiss the indictment where a violation is found. Unlike the Fourth Circuit, they recognized that general principles from other constitutional contexts cannot be applied in contravention of the Speech or Debate Clause, and that the purposes of the Clause cannot be vindicated unless a court can review and remedy a Speech or Debate violation occurring in the grand jury.

Whether the Clause requires dismissal of an indictment because of the use of privileged legislative evidence in the grand jury is a question that will recur in investigations of other Members of Congress. The facts of this case highlight the need to resolve the circuit conflict on this question: there is no remedy available to Mr. Jefferson for a Speech or Debate violation in the grand jury simply because the government chose to indict him in Virginia rather than in the District of Columbia, where Mr. Jefferson's home, his office, and Congress itself are all located.

It is likely that in opposing this petition, the government will refer, as it did in its brief below, to the $90,000 that was found in Mr. Jefferson's

freezer. But that widely-reported fact has no bearing here.[2] Mr. Jefferson maintains his innocence and will defend against all of the charges in the indictment at trial. More importantly for purposes of this petition, he – like all current and former Members of Congress – has an absolute constitutional right not to stand trial at all on charges obtained in violation of the Speech or Debate Clause. Given the circuit conflict and the importance of the constitutional issue involved, review by this Court is warranted.

A. The Charges at Issue.

Mr. Jefferson was a Member of the United States House of Representatives, representing the 2nd District of Louisiana, from 1991 until January 2009. As set forth in the indictment, during his tenure in Congress, Mr. Jefferson served on several legislative committees, subcommittees and caucuses that focused on issues relating to trade in general, and trade with Africa in particular. C.A. App. 20.

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[2] The money in the freezer is not alleged to be a bribe received by Mr. Jefferson. Rather, it was transmitted to Mr. Jefferson by the government's cooperating witness during the course of the FBI's sting operation so that he would pass it to a foreign government official. C.A. App. 50. But Mr. Jefferson did not do that. Instead, the marked funds were recovered in his home. C.A. App. 51-52. The count in the indictment relating to those funds, which alleges a violation of the Foreign Corrupt Practices Act, was not one of the counts that were the subject of the underlying motion to dismiss, and it will not be affected by any ruling on this petition.

The sixteen count indictment includes fourteen counts that are based upon allegations of bribery. In addition to the two counts expressly charging bribery (Counts 3 and 4), the counts charging conspiracy, honest services wire fraud, money laundering and RICO violations (Counts 1-2, 5-10, 12-14 and 16) also depend on allegations that Mr. Jefferson solicited or agreed to accept things of value from companies seeking to do business in West Africa in return for the performance of "official acts" to assist those companies.[3] In other words, the crux of the alleged bribery schemes is the assertion that Mr. Jefferson "sold" his influence with African leaders to aid companies seeking opportunities in Africa.

The indictment expressly alleges that Mr. Jefferson solicited things of value in exchange for use of his influence with foreign officials. C.A. App. 33, 55 (the official acts allegedly performed by Mr. Jefferson included "conducting official travel to foreign countries and meeting with foreign government officials for the purpose of influencing those officials"). The government has consistently maintained that this alleged sale of influence is what the case is all about. For instance, Mr. Jefferson moved to dismiss the bribery counts for failure to allege any official act as that term is defined in the bribery statute. In response, the government specifically pointed to the allegations charging the use of Mr. Jefferson's influence to support its claim

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[3] The portion of Count 1 that alleges a conspiracy to violate the Foreign Corrupt Practices Act is not covered by the motion to dismiss.

that the indictment made out a bribery case. C.A. App. 133. And, during the hearing on the instant motion in the trial court, the government argued that dismissing the indictment on Speech or Debate grounds would provide a barrier to prosecution "whenever a congressman is charged with using influence in return for things of value." C.A. App. 265.

As explained below, the Speech or Debate challenge at issue here focuses on the 14 bribery-based counts in the indictment relating to this alleged sale of influence.

B. Proceedings on Mr. Jefferson's Motion for Review of Grand Jury Materials and to Dismiss.

The indictment's references to Mr. Jefferson's committee, subcommittee and caucus memberships, the contents of recorded conversations provided in discovery by the government, and the fact that current and former staffers with knowledge of Mr. Jefferson's legislative activities involving African trade had testified in the grand jury, strongly suggested that privileged Speech or Debate evidence had been presented to the grand jury. Accordingly, Mr. Jefferson filed a motion in the trial court seeking review of the transcripts of all grand jury proceedings in this case, under the standard set forth in *United States v. Rostenkowski*, 59 F.3d 1291, 1313 (D.C. Cir. 1995), coupled with a request that all counts in the indictment obtained through the use of privileged legislative materials be dismissed. C.A. App. 113-28.

In response to the motion, the government asserted that the grand jury had heard no privileged evidence, but offered to make transcripts of the staffers' grand jury testimony (but no others) available to the defense for review. The defense's examination of these transcripts revealed that, contrary to the government's claims, information relating to Mr. Jefferson's legislative activities *had* been provided to the grand jury. The transcripts included testimony by legislative aides describing Mr. Jefferson's legislative activities in Congress and, particularly, his leading role in the passage of a trade bill known as the African Growth and Opportunity Act ("AGOA"). C.A. App. 178-79, 181-83. The transcripts also included questioning by the prosecutors that directly linked this testimony to Mr. Jefferson's influence with African leaders.

The most significant evidence of legislative activities came from Lionel Collins, who served as Congressman Jefferson's chief of staff for a number of years. After meeting with Collins in advance of his grand jury testimony, the prosecutors asked a broad question on the record inviting him to describe the Congressman's relationships with government officials in Nigeria. Collins described how Mr. Jefferson had been on the forefront of bringing democracy to the country. He then explained:

> And then a second thing, as I mentioned, a trip in 1997, the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa. Congressman

> Jefferson was very instrumental in moving the legislation through the Congress, and it was voted on by the House and Senate side. It was passed.
>
> Congressman Jefferson had a lot of the African ambassadors involved in the legislation and so forth, and the legislation was very instrumental to the continent of Africa .... So as a result, Congressman Jefferson knew the leaders, the African leaders. When they would come to the United States, they would visit with the President and always come to Capitol Hill, visit with members of Congress, and Jefferson personally knew probably about 30 leaders, heads of state, and all of them were thankful because of his involvement with this legislation that passed, that opened up all kind[s] of trading opportunities with the continent of Africa.
>
> So as a result of that, Congressman Jefferson became known as a member who, basically, his specialty was international trade and, in particular, Africa. . . .

C.A. App. 182.

The prosecution immediately followed up on this testimony with argumentative questions linking

Mr. Jefferson's legislative activities to his unique influence with African leaders:

> Q. So it's an understatement to say he was very influential with high-ranking government officials in Nigeria?
>
> A. Nigeria, but Africa – I can list about 20 countries that he knew the leaders and influential – and when the leaders would come to the United States, they would visit him.
>
> Q. And would you say Congressman Jefferson was one of the most influential members of Congress with respect to African nations?
>
> A. Probably so, yes, on the trade side, international trade.

C.A. App. 183.

The grand jury also heard exchanges with staff members Melvin Spence and Stephanie Butler that reinforced Mr. Collins' testimony connecting Mr. Jefferson's influence in Africa to his legislative acts. C.A. App. 178-79.

Because the government had introduced evidence of Mr. Jefferson's legislative activities and drawn an express connection between these activities and the influence that is the crux of the bribery schemes, the defense sought dismissal of the 14 bribery-related counts in the indictment. In the

alternative, Mr. Jefferson maintained that the defense or the trial court should review the rest of the grand jury transcripts to determine whether additional evidence of legislative activities had been put before the grand jury.

By order dated November 30, 2007, the trial court denied Mr. Jefferson's request to review the grand jury materials, but stated that it would review them itself in camera. C.A. App. 221. The court ordered the government "to provide the Court for in camera review those portions of the grand jury record that have not been provided to the defendant." *Id.* In response to this order, the government submitted transcripts of the testimony of the remaining (non-staff member) witnesses to the trial court.[4]

Ruling from the bench at a hearing on February 6, 2008, the district court denied the motion to dismiss, C.A. App. 272-86, and issued a written order to that effect on the same date, App. 34a-35a, followed by a memorandum opinion on February 13, 2008. *United States v. Jefferson*, 534 F. Supp.2d 645 (E.D. Va. 2008); App. 36a-56a. The court stated that although it had reviewed the grand jury transcripts submitted by the government, such a review was not compelled on the record before it. Nevertheless, the trial court's decision was predicated on its consideration of the evidence

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[4] However, the government did not provide transcripts of the prosecutors' instructions to, or colloquies with, the grand jurors – for no reason other than that these matters, although recorded, had not been transcribed. C.A. App. 311 n.7. The defense objected to this failure both in the trial court, C.A. App. 342, and on appeal. *See* 546 F.3d at 309-10, App. 20a.

submitted to the grand jury. The court found that the transcripts it read contained no Speech or Debate material, and that the staff member excerpts identified by the defense, including the testimony of Lionel Collins, did not violate the Speech or Debate Clause.

Mr. Jefferson appealed the trial court's denial of his motion to dismiss to the Fourth Circuit.

C. The Fourth Circuit's Decision.

Unlike the trial court, the Fourth Circuit refused even to consider whether the evidence presented to the grand jury in this case violated the Speech or Debate Clause. Although it described the trial court's review of the grand jury record and outlined the trial court's holdings in its opinion, the Fourth Circuit did not analyze the Collins testimony or any other grand jury evidence, and it did not review or adopt the trial court's findings.

Instead, the Fourth Circuit based its decision on more general principles of grand jury independence and criminal procedure. The court stated:

> Under controlling precedent, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege.

546 F.3d at 312; App. 26a. The court relied for this proposition primarily on *Costello v. United States*,

350 U.S. 359 (1956), a Fifth Amendment case holding that an indictment could not be challenged on the ground that the only evidence before the grand jury was hearsay. It also cited *United States v. Calandra*, 414 U.S. 338 (1974), which held that the exclusionary rule does not apply in the grand jury, so evidence derived from violations of the Fourth Amendment can be put before that body.

The Fourth Circuit emphasized that it had "consistently adhered to *Costello*'s guiding and settled principles." 546 F.3d at 313; App. 28a. It pointed to its prior decision in *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), in which,

> in a context not unlike that presented here, we concluded that the *Costello* mandate barred us from looking behind an indictment to assess whether the grand jury had considered privileged legislative materials.

546 F.3d at 313; App. 28a. The court concluded here that "[b]ounded by such precedent, we are likewise not entitled to review the grand jury record in Jefferson's case – the Indictment simply does not question any legislative acts." *Id.*[5]

Mr. Jefferson's petition for rehearing en banc was denied by the Fourth Circuit.

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[5] The Fourth Circuit also noted that although the trial court's review of the grand jury record was not required by controlling authorities, the trial court's decision to conduct such a review was within its discretion. 546 F.3d at 314; App. 31-32a.

D. Further Proceedings.

Following the denial of his petition for rehearing en banc, Mr. Jefferson filed a motion asking the Fourth Circuit to stay issuance of its mandate pending certiorari, so that he would not have to stand trial until his Speech or Debate claims were finally resolved. This motion was denied by order dated December 29, 2008.

Mr. Jefferson then filed a motion in the trial court asking it to set a trial date after the expected completion of the certiorari process in this Court. By order dated January 15, 2009, the trial court denied the motion. Due to considerations of its docket, however, the court set the trial to begin on May 26, 2009, which it acknowledged would have the practical effect of allowing this petition to be considered. Given this trial date, no stay is currently necessary. Mr. Jefferson will seek further relief regarding the trial date if this petition is granted or has not been resolved by the time of trial.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to resolve a clear split in the circuits on a significant constitutional question: whether the Speech or Debate Clause protects a Member of Congress from having to defend against an indictment obtained through use of privileged Speech or Debate material in the grand jury. The Fourth Circuit's erroneous conclusion that a Member cannot challenge an indictment on these grounds – which is contrary to the view of the three other circuit courts that have considered this issue – is based on a misapplication

of *Costello* and ignores this Court's teachings concerning the purposes and scope of the Clause and the absolute nature of the privilege it creates. As a result, the Fourth Circuit never reached the critical question of whether the bribery-related counts in the indictment should have been dismissed. If the opinion stands, a Member of Congress indicted in the Fourth Circuit would have no recourse and would be forced to stand trial even if the prosecution introduced evidence of his privileged legislative acts in the grand jury.

A. The Fourth Circuit's Decision Is in Direct Conflict with the Decisions of Other Circuits that Have Addressed this Issue.

There is a real and significant conflict between the decision of the Fourth Circuit in this case and the decisions of the D.C. Circuit in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the Eleventh Circuit in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), and the Third Circuit in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980).[6] Although its opinion does not acknowledge the existence of a conflict, the Fourth Circuit's holding that *Costello* and *Calandra* preclude a court from examining whether Speech or

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[6] In *United States v. Durenberger*, Crim. No. 3-93-65, 1993 WL 738477 (D. Minn. Dec. 3, 1993), the district court in Minnesota also held that a court could review the evidence presented to the grand jury and dismiss the indictment where it was "plausible" that the grand jurors had relied on privileged legislative material. 1993 WL 738477 at *2-4.

Debate evidence was presented to the grand jury is fundamentally at odds with the position taken by the other circuits.

1. The conflict with *Rostenkowski*.

The Fourth Circuit addressed *Rostenkowski*, as well as *Helstoski*, only in one footnote in its opinion. It noted that those decisions had "observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause might be used to invalidate an indictment." 546 F.3d at 314 n.8; App. 31a n.8 (emphasis original). The Fourth Circuit stated that it had no reason to reach this issue because Mr. Jefferson had not alleged a pervasive violation. *Id.* But the court ignored the findings and reasoning of those cases, which plainly contradict the conclusion that the government's use of Speech or Debate material in the grand jury was immune from challenge.

In *Rostenkowski*, the D.C. Circuit considered a motion by the defendant for in camera review of grand jury materials. In determining whether it could hear an interlocutory appeal from the trial court's denial of that motion, the D.C. Circuit stated that the jurisdictional question "depends upon whether an indictment would be deemed invalid solely because it was procured by the use of material protected by the Speech or Debate Clause." *Rostenkowski*, 59 F.3d at 1297. "If so, then to delay review until after trial would be to deny the Congressman the protection from 'the cost and inconvenience of litigation' to which he is entitled under that Clause." *Id.* The court therefore was

required to resolve "whether the protection of the Speech or Debate Clause extends beyond the face of the indictment to limit the materials that may lawfully be presented to a grand jury." *Id.* (citations omitted). Basing its analysis on the purposes of the Clause – to protect legislators from intimidation and to prevent them from being distracted or hindered in carrying out their legislative tasks – the court found that it did:

> In order to fully secure these purposes, it seems that a court may find it necessary, at least under some circumstances, to look beyond the face of an indictment and to examine the evidence presented to the grand jury. ... Otherwise, a prosecutor could with impunity procure an indictment by inflaming a grand jury against a Member upon the basis of his Speech or Debate, subject only to the necessity of avoiding any reference to the privileged material on the face of the indictment.

Id. at 1298 (citations omitted).

In reaching this conclusion, the *Rostenkowski* court carefully examined both *Costello* and *Calandra*. It found that the general rule set down by these cases – that a facially valid indictment is not subject to dismissal on the ground that improper evidence was introduced in the grand jury – did *not* foreclose the examination of grand jury evidence in a Speech or Debate challenge. "While we accept the validity of those propositions in general, of course,

we do not think that they are applicable where they would undermine the important purposes served by the Speech or Debate Clause." *Rostenkowski*, 59 F.3d at 1298. The D.C. Circuit further explained that *Calandra* involved the use of evidence seized in violation of the Fourth Amendment, not Speech or Debate material. "Unlike a violation of the Fourth Amendment, which the *Calandra* court held to be a past abuse and thus the lawful basis for subsequent grand jury questioning, it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 59 F.3d at 1298, *quoting In re Grand Jury Investigation*, 587 F.2d 589, 598 (3d Cir. 1978).[7]

Although the D.C. Circuit ultimately determined that Rostenkowski had not made a sufficient showing that Speech or Debate material had been used in the grand jury in his case and, therefore, that no review of grand jury materials was warranted, its conclusions that such a review must be undertaken in appropriate cases in order to fully vindicate the purposes of the Clause, and that an indictment can be deemed invalid solely because it was procured by use of privileged legislative

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[7] The reference to "pervasive" Speech or Debate violations, cited by the Fourth Circuit in its footnote, was made by the D.C. Circuit when it noted that even the government conceded that pervasive violations could invalidate an indictment. *See* 59 F.3d at 1229. The plain import of this statement, and of *Rostenkowski's* approach to this issue, is that other types of violations may also be grounds for dismissing an indictment.

material, stand in direct contrast to the Fourth Circuit's decision here.

2. The conflict with *Helstoski*.

In *Helstoski*, the Third Circuit held that an indictment based on "wholesale violation of the speech or debate clause before a grand jury" could not survive. 635 F.2d at 205. Its decision was predicated on the determination that a court can examine the evidence presented in the grand jury and dismiss an indictment because of Speech or Debate violations occurring there.

The *Helstoski* court explicitly rejected the application of *Costello* and *Calandra* in the Speech or Debate context. It noted that *Calandra* itself distinguishes the use of inadequate or incompetent evidence "from instances where what was transpiring before the grand jury would itself violate a constitutional privilege," 635 F.2d at 203, and further recognized that "[t]he purposes served by invoking the speech or debate clause vary greatly from those that the Supreme Court has considered and rejected in other cases seeking to quash indictments." *Id.* at 204. Finally, the court emphasized the importance of protecting Speech or Debate rights at the grand jury stage:

> A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional

> protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

Id. at 205.

3. The conflict with *Swindall*.

The decision of the Eleventh Circuit in *Swindall* also stands for the proposition that the introduction of Speech or Debate evidence in the grand jury may be grounds for invalidating an indictment. The Fourth Circuit discounted Mr. Jefferson's reliance on *Swindall*, describing that case as focusing on the use of evidence of legislative activities at trial. 546 F.3d at 311-12; App. 25a. But *Swindall* was also specifically concerned with the use of legislative material in the grand jury: "When a violation of the privilege occurs in the grand jury phase, a member's rights under the privilege must be vindicated in the grand jury phase." 971 F.2d at 1546-47. And there is no doubt that the *Swindall* court found that the use of legislative material *in the grand jury* was grounds for dismissing an indictment. *See* 971 F.2d at 1547 ("During the grand jury phase, Swindall's Speech or Debate privilege was violated in two separate ways. First, his privilege against criminal liability was violated when reference to Speech or Debate material was used as critical evidence leading to his indictment. Second, his privilege against being questioned in any place other than Congress was violated when he was questioned before the grand jury about Speech or

Debate matters. Each violation, standing alone, requires dismissal of the affected counts.").

Swindall is based on the fundamental proposition that the "Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability," 971 F.2d at 1548, which occurs when legislative material that is relevant to the decision to indict is used in the grand jury. *See id.* The Fourth Circuit's conclusion here that it could not even consider the use of legislative material in the grand jury is plainly inconsistent with the holding in *Swindall*.

4. The impact of the Fourth Circuit's decision in *Johnson*.

The Fourth Circuit's decision cited *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), as controlling precedent. That case concerned a Member of Congress who was initially convicted on an indictment that included a conspiracy count based in part on a speech in Congress. After Johnson's conviction was reversed, the conspiracy count was dismissed, and Johnson was retried and found guilty on the remaining counts. Johnson then challenged his conviction on those counts on the ground that the grand jury that had returned all of the counts had heard the evidence of his Congressional speech. Relying on *Costello*, the court rejected his challenge, holding that a facially valid indictment returned by a legally constituted and unbiased grand jury was all that was required by the Fifth Amendment. 419 F.2d at 58. It also rejected

Johnson's claim that the grand jury was biased because it had heard evidence of his speech. *Id.*

But *Johnson* was not controlling here. Unlike Johnson, Mr. Jefferson did not assert bias as grounds for dismissing any of the charges against him. More importantly, the counts at issue on the motion to dismiss in *Johnson* "had nothing to do with his speech." 419 F.2d at 58. In other words, once the conspiracy charge was dismissed, the privileged material presented to the grand jury was not relevant to any remaining charges. In this case, by contrast, Mr. Jefferson is seeking to dismiss only those counts to which the Speech or Debate evidence *was* relevant: the 14 bribery-related counts, which focus on the sale of the influence that his staffer testified he derived from his legislative acts.[8] Even if *Johnson* were deemed to be controlling, however, it would only further demonstrate the conflict between the Fourth Circuit's approach to a claim that Speech or Debate evidence was improperly used in the grand jury and the approach of the other circuits that have considered this issue.

Thus, there is no doubt that there is a split in the circuits concerning the scope of a court's authority to review the use of Speech or Debate

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[8] Consistent with *Johnson*, Mr. Jefferson sought the dismissal only of those counts affected by the improper evidence about his legislative activities. Mr. Jefferson's influence with African leaders had nothing to do with two of the indictment's 16 counts, to wit, those alleging a violation of the Foreign Corrupt Practices Act (Count 11) and obstruction of justice (Count 15). Accordingly, Mr. Jefferson has never argued that those two counts should be dismissed.

evidence in the grand jury. This conflict has serious practical consequences. The work of Members of Congress is centered in the District of Columbia, but they come from every district in the country, may maintain a residence in Maryland or Virginia, and travel frequently, usually through airports in Virginia. As a result, prosecutors investigating a Member of Congress may have a choice of venues in which to pursue any given case. Under the law as it currently stands, a Member's absolute Speech or Debate privilege will be accorded a different level of protection depending upon the government's choice of forum. Indeed, in this case, the defendant – who owns a home in the District of Columbia and who is charged with operating his Congressional office in the District of Columbia in an illegal fashion – could not obtain review of his Speech or Debate claim simply because the government chose to bring its case against him in Virginia. This is an untenable state of affairs. Granting of a writ of certiorari is warranted so that this Court can resolve this important constitutional conflict.

B. The Fourth Circuit's Erroneous Decision Undermines the Protections Afforded by the Speech or Debate Clause as Defined by This Court.

The Fourth Circuit's decision places no check on a prosecutor's ability to introduce privileged legislative materials in the grand jury. As a result, it significantly undermines the protections the Speech or Debate Clause was intended to offer, as defined in this Court's own decisions. In resolving the conflict

between the circuits on this issue, the Court should reverse the erroneous decision of the Fourth Circuit.

1. The Speech or Debate Clause protects legislators against the use of Speech or Debate evidence in the grand jury.

The Speech or Debate Clause provides that Members of Congress "shall not be questioned in any other Place" for their legislative activities. It is a unique provision, which "was designed neither to assure fair trials nor to avoid coercion." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Instead, its purpose is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). Indeed, this Court has stated that "the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (citations omitted). It also "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966).

In order to accomplish these purposes, the Speech or Debate Clause prohibits "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. The clause applies to all acts within the "legislative sphere." *Gravel v. United States*, 408 U.S. 606, 624 (1972); and as to such

activities, "the prohibitions of the Speech or Debate Clause are *absolute*." *Eastland*, 421 U.S. at 501 (emphasis added). In addition to actual speech or debate, activities within the legislative sphere include those

> that are an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 625.

The Speech or Debate Clause protects Members both from criminal prosecutions and civil suits based on legislative activity. *See Eastland*, 421 U.S. at 502-503. It bars the introduction of evidence referring to legislative acts in any prosecution against a Member:

> Revealing information as to a legislative act – speaking or debating – to a jury would subject a Member to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.

United States v. Helstoski, 442 U.S. at 490. And the Clause protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Thus, even requiring a Member to stand trial as the result of legislative activities is a violation of the Clause.

The circuit courts in *Rostenkowski*, *Helstoski*, and *Swindall* correctly applied these Speech or Debate principles in concluding that the purposes of the Clause could not be vindicated unless a court could examine the evidence presented to the grand jury in an investigation of a Member of Congress. Otherwise, as the D.C. Circuit recognized, as long as no legislative activity appeared in the indictment itself, a prosecutor could, "with impunity," use Speech or Debate evidence in the grand jury to obtain an indictment and bring a legislator to trial. *Rostenkowski*, 59 F.3d at 1298.

Allowing the use of evidence of legislative activities in the grand jury would clearly chill a legislator's freedom of action. As the Third Circuit explained,

> We must recognize that the mere issuance of an indictment has a profound impact on the accused, whether he be in public life or not. Particularly for a Member of Congress, however, publicity will be widespread and devastating. Should an election intervene before a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat

> lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career. ...

Helstoski, 635 F.2d at 205 (citations omitted).

Further,

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury.

Id.

2. The Fourth Circuit misapplied *Costello* and *Calandra*.

The Fourth Circuit failed to give appropriate consideration to this Court's strong pronouncements about the purposes and scope of the Clause, and also failed to consider the impact that use of Speech or Debate evidence in the grand jury would have on legislative independence. Instead, it reached the conclusion that it was barred from looking behind

the indictment to examine whether the Speech or Debate Clause was violated in the grand jury by mechanically, and erroneously, applying the rule of *Costello* and *Calandra* to this case.

Neither *Costello* nor *Calandra* involve the Speech or Debate Clause. *Costello* concerned a tax evasion prosecution in which cross-examination at trial revealed that the only evidence presented to the grand jury was hearsay testimony from government investigators. The defendant moved to dismiss the indictment, arguing that the grand jury's reliance on mere hearsay from the investigators violated the Fifth Amendment's requirement that federal prosecutions be instituted by indictment. The Court rejected this claim, holding that where a facially valid indictment was returned by "a legally constituted and unbiased grand jury," the indictment cannot be challenged as based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363. The fundamental question addressed in *Costello* was whether the Constitution set minimum evidentiary requirements for return of an indictment. The Court's conclusion that there is no constitutional minimum simply does not speak to the consequences of a Speech or Debate violation occurring in the grand jury.

Calandra involved a witness who refused to answer questions in the grand jury that were based on illegally-seized documents. The Court declined to apply the exclusionary rule to grand jury proceedings, finding that doing so would not advance the rule's purpose of deterring future Fourth Amendment violations. *Calandra*, 414 U.S. at 351. In reaching this holding, the Court reiterated

Costello's rule regarding facially valid indictments. But, importantly, it also made it clear that while a grand jury has broad powers to investigate, it "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Id.* at 346. The Court rejected the argument that grand jury questioning based on evidence seized in violation of the Fourth Amendment was itself an independent constitutional violation. *Id.* at 354.

By contrast, this Court has expressly recognized that the introduction of evidence of legislative activities *is* questioning that constitutes an independent constitutional violation of the Speech or Debate Clause. *See United States v. Helstoski*, 442 U.S. at 490. Such violations can only be policed and remedied if courts have the power in appropriate cases to review the evidence presented to the grand jury and dismiss indictments obtained through use of Speech or Debate materials.

Although this Court has not ruled on this question directly, its decision in *Helstoski v. Meanor* is instructive. The defendant in that case sought a writ of mandamus from the appellate court directing the trial court to dismiss the indictment against him. One of his arguments was that "the indictment was invalid because the grand jury had heard evidence of legislative acts." 442 U.S. at 504-505. In rejecting the mandamus request, the court of appeals "declined to go behind the indictment, holding that it was valid on its face." *Id.* at 505. This Court held that mandamus was unavailable because the defendant could have taken a direct appeal from the district court order denying his motion to dismiss. *Id.* at 506.

The Court found that such an appeal was necessary to fully vindicate a legislator's right to be protected from having to defend against charges obtained in violation of the Clause. While *Helstoski v. Meanor* did not reach the question of the validity of the indictment, its holding assumes that courts do have the power to consider a claim that the Speech or Debate Clause has been violated in the grand jury. It further suggests that such a claim must be analyzed in light of the unique purposes of the Clause, and supports the conclusion that an inquiry into the improper use of Speech or Debate evidence in the grand jury is not precluded by *Costello* or *Calandra*.

Because the Fourth Circuit erroneously held that *Costello* and *Calandra* precluded it from looking behind the indictment in this case, this Court should grant the writ of certiorari and reverse the decision of the Fourth Circuit.

C. The Fourth Circuit's Decision Allowed a Violation of the Speech or Debate Clause to Go Unreviewed and Unremedied.

There is no doubt that evidence of legislative activity within the meaning of the Speech or Debate Clause was introduced in the grand jury in this case. The testimony of Lionel Collins describes Mr. Jefferson's leadership role in the passage of AGOA, a major African trade bill, and some of the methods he used in that effort. The Speech or Debate Clause covers all acts within the "legislative sphere." *Gravel*, 408 U.S. at 624-25. This includes activities that are "an integral part of the deliberative and

communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Id.* at 625. Collins' testimony falls squarely within this definition. Indeed, in discussing this testimony, the trial court acknowledged that "a Member's role in passing legislation is the sort of legislative activity protected by the Clause." C.A. App. 319.

Because of its reliance on *Costello*, however, the Fourth Circuit failed to consider whether the use of Collins' testimony in the grand jury violated the Speech or Debate Clause. The court below never reached Mr. Jefferson's argument that this evidence was directly relevant to the government's theory of the bribery counts, and that it was used by the government to advance its case in support of those counts.[9] As a result, a serious breach of the legislative privilege went unreviewed and unremedied.

The testimony about Mr. Jefferson's activities in support of the AGOA legislation was expressly connected to his influence with African officials and, therefore, directly relevant to the criminal conduct alleged in the indictment. The bribery charges against Mr. Jefferson are predicated on his alleged use of his influence to get other people – mostly African government officials, and a few U.S. government agencies – to assist various businesses, in return for things of value. As set forth above, the

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[9] The trial court's erroneous conclusion that no Speech or Debate violation occurred here was accordingly not reviewed by the Fourth Circuit.

government has repeatedly described this case as one involving the sale of influence. Indeed, the district court's description of the various schemes alleged in the indictment, which was adopted by the Fourth Circuit, confirms that the use of Mr. Jefferson's influence to promote business ventures is at the heart of the bribery charges. *See* 546 F.3d at 303-304; App. 4a-6aa (the indictment alleges that in return for things of value, the defendant "met with foreign government officials to promote the use of iGate's technology;" "met with Ghanaian governmental officials to promote Mody's, IBBS's, and W2-IBBS's interests in Ghana and elsewhere in Africa;" met with "Nigerian government officials to promote the interests of Arkel Oil and Gas;" and met with "Nigerian government officials to promote TDC's interests in Nigeria").

Collins' testimony, underscored by the prosecutor's follow-up questions, established that Mr. Jefferson possessed uniquely valuable influence that he allegedly sold in these schemes, and that his influence was principally derived from his work on the passage of African trade legislation. The introduction of this evidence of Mr. Jefferson's legislative activities was "questioning" of the type prohibited by the Clause. *See United States v. Helstoski*, 442 U.S. at 490.

As the Eleventh Circuit appropriately recognized in *Swindall*, the Speech or Debate privilege is violated in the grand jury "if the Speech or Debate material exposes the member to liability," that is, if it is relevant to the decision to indict. *See* 971 F.2d at 1548. This was the case here. Proof that Mr. Jefferson actually had influence in Africa –

which was based on his privileged activities in connection with African trade legislation – supported the government's theory that he was selling influence to businesses seeking projects in Africa. It also supported the government's contention that the transactions described in the indictment involving members of Mr. Jefferson's family were not legitimate business activities, but were merely "shams" designed to disguise schemes for the sale of Mr. Jefferson's influence. There is no way to separate the privileged evidence from the other evidence heard by the grand jury, and no way to conclude that the grand jury did not rely on the evidence showing that Mr. Jefferson had influence in Africa, derived from his legislative activities, in deciding that the government had provided sufficient proof of the alleged bribe schemes.[10] Therefore, the "infection cannot be excised," *Helstoski*, 635 F.2d at 205, and the affected counts should not be permitted to stand.

Vindicating the Speech or Debate Clause in this manner would not immunize Members of Congress for anything they do while in office or place them above the law; nor would it impose unwarranted burdens on law enforcement.

> All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution

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[10] It certainly cannot be concluded that the grand jury did not rely on this evidence or treat it as important when the prosecutors' colloquies with and instructions to the grand jury were not provided to the court for review. C.A. App. 311 n.7.

> and refrain from introducing evidence of past legislative acts or the motivation for performing them.

Helstoski, 635 F.2d at 206. To ensure that courts will protect the Speech or Debate privilege where a showing has been made that the government used evidence of a Member's privileged legislative acts in the grand jury in support of an indictment, this Court should grant a writ of certiorari and reverse the judgment of the Fourth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM J. JEFFERSON, No. 08-4215
Defendant-Appellant.

CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,
Amicus Supporting Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, Senior District Judge.
(1:07-cr-00209-TSE-1)

Argued: September 24, 2008

Decided: November 12, 2008

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Niemeyer and Judge Duncan joined.

COUNSEL

ARGUED: Robert P. Trout, TROUT CACHERIS, P.L.L.C., Washington, D.C., for Appellant. Mark D.

Lytle, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. ON BRIEF: Amy Berman Jackson, Gloria B. Solomon, TROUT CACHERIS, P.L.L.C., Washington, D.C., for Appellant. Chuck Rosenberg, United States Attorney, David B. Goodhand, Assistant United States Attorney, Rebeca H. Bellows, Assistant United States Attorney, Charles E. Duross, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. Melanie Sloan, Anne Weismann, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Washington, D.C., for Amicus Supporting Appellee.

OPINION

KING, Circuit Judge:

By way of this interlocutory appeal, Congressman William J. Jefferson seeks relief from the district court's denial of his motion to dismiss a pending indictment (the "Indictment"). *See United States v. Jefferson*, 534 F. Supp. 2d 645 (E.D. Va. 2008) (the "Opinion"). Jefferson contends -- as the essential premise of his appeal -- that the grand jury was improperly presented with evidence of his legislative acts and that such evidence was relevant to its decision to indict. He asserts that the Indictment thus contravenes the legislative immunity provided to him by the Speech or Debate Clause of the Constitution, *see* U.S. Const. art. I, § 6,

cl. 1, and must be dismissed. As explained below, we reject this contention and affirm.

I.

A.

Congressman Jefferson, who represents Louisiana's Second Congressional District, was indicted on June 4, 2007, by a grand jury in the Eastern District of Virginia. The Indictment charges Jefferson with participating in multiple schemes and related offenses. In such alleged schemes, Jefferson solicited and received bribes from various persons and business entities. In exchange, he promoted their products and services to government officials in Africa. Specifically, the Indictment alleges two separate conspiracy offenses, each in violation of 18 U.S.C. § 371, plus fourteen substantive offenses.[1]

The facts alleged in the Indictment reflect seven separate bribery schemes. In its Opinion of February 13, 2008, declining to dismiss the Indictment, the district court summarized the

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[1] The fourteen substantive offenses in the Indictment are as follows: two counts for solicitation of bribes, in violation of 18 U.S.C. § 201(b)(2)(A); six counts of wire fraud, in contravention of 18 U.S.C. §§ 1343, 1346; a single charge of violating the Foreign Corrupt Practices Act, specifically 15 U.S.C. § 78dd-2(a); three counts of money laundering, in violation of 18 U.S.C. § 1957; an obstruction-of-justice charge, under 18 U.S.C. § 1512(c)(1); and one count of racketeering, in contravention of 18 U.S.C. § 1962(c).

various bribery schemes. We are satisfied to adopt that summary, which is as follows:

> First, the indictment alleges that defendant solicited bribes from Vernon Jackson, president of iGate, Incorporated (iGate), a Louisville, Kentucky-based telecommunications firm, to promote iGate's telecommunications technology in certain African countries. In return for payments of money and iGate shares to the ANJ Group, L.L.C. (ANJ), a Louisiana limited liability company ostensibly controlled and managed by defendant's spouse, Andrea Jefferson, defendant allegedly sent letters on official letterhead, conducted official travel, and met with foreign government officials to promote the use of iGate's technology.
>
> Second, the indictment alleges that defendant solicited bribes from Netlink Digital Television (Netlink), a Nigerian corporation that was pursuing a telecommunications venture in Nigeria and elsewhere in Africa. In return for a share of revenue, stocks, and fees from Netlink, defendant allegedly performed various official acts including meeting with Nigerian government officials to promote Netlink's business.
>
> Third, the indictment alleges that defendant induced Lori Mody, an Alexandria, Virginia-based businesswoman, to finance a

telecommunications project in Africa using iGate's technology. Defendant allegedly solicited bribes from Mody in the form of shares in W2-IBBS, a Nigerian company formed by Mody to pursue the Nigerian telecommunications project, as well as money to be paid to defendant's family members. In return for these bribes, defendant allegedly used his office to promote W2-IBBS's interests in Nigeria and elsewhere in Africa. Defendant also allegedly solicited bribes in the form of shares in IBBS, a Ghanian company formed by Mody to pursue the telecommunications project in that country. In return, defendant allegedly sent letters on official letterhead, conducted official travel to Ghana, and met with Ghanian government officials to promote Mody's, IBBS's, and W2-IBBS's interests in Ghana and elsewhere in Africa. The indictment also alleges that to advance this bribery scheme, defendant introduced Mody to officials of the Export-Import Bank of the United States (Ex-Im Bank) to assist Mody in securing financial assistance. Defendant and Mody also allegedly discussed bribing Nigerian government officials to facilitate the W2-IBBS telecommunications project. It is further alleged that defendant then met with and offered to bribe Atiku Abubakar, who was then the Vice President of Nigeria. And, according to the indictment, defendant received $ 100,000 in cash from Mody for the purpose of paying Abubakar a bribe.

Fourth, the indictment alleges that defendant solicited and received bribes from businessman George Knost and from Arkel International, Inc., Arkel Sugar, Inc., and Arkel Oil and Gas, Inc. In return for the bribes, defendant allegedly performed various official acts, including meeting with officials of the Ex-Im Bank to promote an Arkel Sugar project in Nigeria and meeting with Nigerian government officials to promote the interests of Arkel Oil and Gas.

Fifth, the indictment alleges that defendant solicited and received bribes from businessman John Melton and from TDC Energy Overseas, Inc. (TDC). In return for these bribes, defendant allegedly performed various official acts, including meeting with Nigerian government officials to promote TDC's interests in Nigeria and meeting with officials of the United States Trade Development Agency (USTDA) to encourage the USTDA to grant TDC financial assistance for TDC's Nigerian oil field project.

Sixth, the indictment alleges that defendant, through an intermediary, lobbyist James Creaghan, solicited bribes from businesswoman Noreen Wilson in return for which defendant used his office to assist in resolving a dispute over oil exploration rights in the waters off Sao Tome and Principe. It is

> alleged that defendant received payments from Wilson, via Creaghan, either directly or through a nominee company.
>
> Seventh, the indictment alleges that defendant solicited and received bribes from Life Energy Technology Holdings (LETH), a Delaware corporation engaged in the business of manufacturing and distributing energy-related technology. In return for these bribes, it is alleged that defendant traveled in his official capacity to Nigeria, Equatorial Guinea, Cameroon, and Sao Tome and Principe and met with government officials in those countries to promote LETH's technology to those government officials.

United States v. Jefferson, 534 F. Supp. 2d 645, 647-48 (E.D. Va. 2008).

B.

On September 7, 2007, three months after the grand jury returned the Indictment, Jefferson filed a motion requesting that the district court review the grand jury materials and dismiss the Indictment (the "Motion"). The Motion was predicated upon Jefferson's belief and contention that the grand jury had considered testimony that contravened his rights under the Speech or Debate Clause.[2]

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[2] The Speech or Debate Clause provides, "[F]or any Speech or Debate in either House, [Senators and

More specifically, according to the Motion, Jefferson was concerned that the grand jury may have considered evidence from Brett Pfeffer, a former Jefferson staffer who had pleaded guilty to related charges and was cooperating with the prosecution. After the prosecution provided Jefferson with recorded statements involving Pfeffer and another cooperating witness, Jefferson surmised that Pfeffer was "extensively involved in the activities underlying the indictment." J.A. 124.[3] Jefferson thus suspected that Pfeffer had testified before the grand jury, that his testimony referenced Jefferson's legislative activities, that Pfeffer's recorded statements had been presented to the grand jury, and that other current or former staffers had likewise provided grand jury testimony regarding Jefferson's legislative activities. As a result, Jefferson requested that all grand jury materials be provided to his lawyers so they could assess whether evidence of his privileged legislative acts had been presented to the grand jury. He also requested the district court to review and assess *in camera* all grand jury transcripts. In that respect, he asserted that, if evidence relating to his legislative acts had been so presented, and if such acts were

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Representatives] shall not be questioned in any other Place." U.S. Const. art. 1, § 6, cl. 1. The Clause serves to immunize a member of Congress from being questioned about his legislative acts. *See Gravel v. United States*, 408 U.S. 606, 616 (1972).

[3] Citations herein to "J.A. " refer to the Joint Appendix filed by the parties in this appeal.

relevant to the grand jury's decision to indict, the court was obliged to dismiss the Indictment.

In response to the Motion, the prosecution denied that the grand jury had heard or considered any Speech or Debate Clause material. Nevertheless, "[o]ut of an abundance of caution and as a result of the claims set forth in the defendant's Motion," the prosecution took steps to assuage Jefferson's concerns. J.A. 151. First, the United States Attorney informed Jefferson that Pfeffer had not testified before the grand jury, and that the prosecution had not presented Pfeffer's recorded statements to the grand jury. Second, the prosecutors made available to Jefferson more than 600 pages of grand jury transcripts -- specifically, testimony provided by his current and former congressional staffers.[4]

Jefferson's lawyers then reviewed and analyzed the grand jury transcripts made available to them. After so doing, Jefferson identified three excerpts thereof that, in his view, violated the Speech or Debate Clause (collectively, the "Excerpts"). The Excerpts relate to the testimony of three grand jury witnesses: Lionel Collins, Jefferson's former chief of staff (the "Collins Excerpt"); Melvin Spence, a former Jefferson staffer (the "Spence Excerpt"); and Stephanie Butler, a

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[4] In disclosing these portions of the grand jury record to Jefferson's lawyers, the prosecution nevertheless asserted that it did not "believe that any of these measures were mandated by any governing legal authority." J.A. 151.

current Jefferson staffer (the "Butler Excerpt"). The Excerpts are summarized as follows:

- *The Collins Excerpt* -- In discussing Jefferson's relationships with certain African leaders, Collins testified:

  > [T]hey were considering legislation dealing with the Africa Growth and Opportunity Act, a trade bill dealing with Africa. Congressman Jefferson was very instrumental in moving the legislation through the Congress, and it was voted on by both the House and Senate side. It was passed. Congressman Jefferson had a lot of African ambassadors involved in the legislation and so forth, and the legislation was very instrumental to the continent of Africa.

  J.A. 160.

- *The Spence Excerpt* -- In response to a prosecutor's question concerning whether Jefferson's constituents viewed him as a leader in a particular geographical area of trade, Spence responded, "Africa would be the closest thing. Like AGOA, the Africa Growth and Opportunity Act, which is a preferential trade bill." J.A. 161.

- *The Butler Excerpt* -- In prefacing a question to Butler, the prosecutor remarked, "The congressman, through his activities in

> Congress, has a special knowledge of West Africa, you know, countries in Subsaharan Africa, Gulf of Guinea area." J.A. 161.

Jefferson asserted to the district court that the Excerpts permitted the grand jury to consider his legislative activities in its decision to indict, thus contravening the Speech or Debate Clause. More specifically, he contended that the Excerpts "demonstrate that the prosecution pursued the theory that Mr. Jefferson developed special expertise and contacts *through his particular legislative work*, which he then allegedly used to assist private business in return for things of value." J.A. 161-62.

C.

On November 30, 2007, the district court heard argument concerning the Speech or Debate Clause issue and ruled on aspects of the Motion. By its bench ruling, the court first declined Jefferson's request for disclosure of all grand jury transcripts to defense counsel. And, by an order of the same day, the court denied Jefferson's request that it review *in camera* the entire grand jury record. The court agreed, however, to conduct a more limited review and assess *in camera* those portions of the grand jury record that the prosecution had not provided to Jefferson.[5]

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[5] As the district court later explained in its Opinion of February 13, 2008, the prosecution ultimately disclosed the entire available grand jury record -- partially to Jefferson and the balance thereof to the court. The record was partially

By its Opinion of February 13, 2008, the district court declined to dismiss the Indictment. Importantly, the Opinion began by recognizing that, "[a]lthough courts are authorized to disclose grand jury matters to a 'defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury,' no such ground was shown here." *Jefferson*, 534 F. Supp. 2d at 649 (quoting Fed. R. Crim. P. 6(e)(3)(E)(ii)). The Opinion then explained why an *in camera* review of the entire grand jury record was not warranted. It emphasized that "*in camera* inspection of grand jury matters is required only on a showing that there is a reason to believe Speech or Debate materials were presented to the grand jury." *Id.* Notwithstanding Jefferson's failure to make such a showing, the court agreed to review and assess the Excerpts and the balance of the available grand jury record "because the Speech or Debate Clause protection afforded legislators is so important, and out of an abundance of caution." *Id.*

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provided to Jefferson when the prosecution permitted him to examine the testimony of his current and former staffers. The balance of the available grand jury record -- those portions not disclosed to Jefferson -- was presented to the court for *in camera* review. *See Jefferson*, 534 F. Supp. 2d at 649. As the Opinion explained, the materials provided to Jefferson and the court did not include any arguments or instructions offered to the grand jury by the prosecutors. Although Jefferson sought *in camera* review of such materials, the arguments and instructions had not been transcribed and were not available. *See id.* at 649 n.7.

The Opinion then proceeded to analyze and explain the district court's view of the scope of the Speech or Debate Clause. Relying on *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court's leading decision with respect to evidentiary challenges under the Speech or Debate Clause, the district court properly observed that

> it is well settled that the government may not introduce evidence of a Member's legislative acts to prove an element of a criminal charge. But the government may rely on acts "casually or incidentally related to legislative affairs but not part of the legislative process itself." Put simply, the Speech or Debate Clause is not a license to commit crime.

Jefferson, 534 F. Supp. 2d at 652 (quoting *Brewster*, 408 U.S. at 528). With these principles in mind, the court explained that it was keeping "an eye toward detecting whether activities integral to defendant's participation in the consideration and passage of legislation played a role in obtaining the indictment." *Id.*

For multiple reasons, the district court concluded that neither the Indictment nor the grand jury proceedings infringed the Speech or Debate Clause. First, in addressing the Indictment, the court concluded that "the schemes and facts alleged therein . . . do not concern defendant's involvement in the consideration and passage or rejection of legislation." *Jefferson*, 534 F. Supp. 2d at 652. The

Indictment alleged that Jefferson met with government officials, conducted official travel, and used his congressional staff to promote business ventures in exchange for bribes. These allegations, the court concluded, focus exclusively on nonlegislative acts that do not give rise to a valid Speech or Debate Clause claim. *See id.*

Next, the district court analyzed the portions of the grand jury record that the prosecution had provided to it for *in camera* review. Although the record "contain[s] references to defendant's status as a congressman and as a member of various congressional committees," the court determined that those references did not contravene Jefferson's legislative immunity. *Jefferson*, 534 F. Supp. 2d at 652. It is well-recognized, the court explained, that "mere reference" to a congressman's status "does not offend the Clause." *Id.* As a result, the portion of the grand jury record that the prosecution supplied to the court for *in camera* review was also unobjectionable under the Speech or Debate Clause. *See id.*

Finally, the district court concluded that none of the Excerpts contravened the Speech or Debate Clause. The court first addressed the Butler Excerpt, determining that although the prosecutor had referred to Jefferson's "activities in Congress," such references do "not violate the Speech or Debate Clause where, as here, it is simply part of a more general inquiry into matters that are incidentally related to a congressman's legislative activities."

Jefferson, 534 F. Supp. 2d at 653. Relying on *Brewster*, the court concluded that the prosecutor had not questioned Jefferson's "involvement in the consideration and passage or rejection of any legislation," but rather had "simply relate[d] to [his] influence and status." *Id.*

The district court then assessed the Spence Excerpt and concluded that it was likewise unobjectionable. The court explained that Spence's grand jury reference to the African Growth and Opportunity Act (the "AGOA") was unrelated to Jefferson's "involvement in the consideration and passage of the Act." *Jefferson*, 534 F. Supp. 2d at 653. Jefferson had contended that the Spence Excerpt violated the Speech or Debate Clause because it expressly mentioned a piece of legislation, but the court disagreed. The Spence Excerpt merely referenced Jefferson's status, which "might induce persons to offer him bribes for official acts." *Id.* As a result, the court concluded that the Spence Excerpt, like the Butler Excerpt, did not implicate or contravene the Speech or Debate Clause. *See id.*

Finally, the Opinion analyzed the propriety of the Collins Excerpt, which, according to Jefferson, violated the Speech or Debate Clause by referring to Jefferson's participation in "moving the legislation through the Congress." *Jefferson*, 534 F. Supp. 2d at 654. The district court rejected this contention as well, for three reasons. First, Collins's reference to Jefferson's actions in passing the AGOA was "neither material nor relevant" to the allegations of

the Indictment. *Id.* Second, the court concluded that, because there were "independent, non-privileged grounds sustaining the charges in the indictment," simply referencing Jefferson's role in passing the legislation did not render the Indictment defective. *Id.* Third, the court emphasized that Collins's statement was unprompted, in that the prosecutor was not inquiring into Jefferson's legislative acts and did not pose any follow-up questions concerning such acts. *See id.* The court thus concluded that neither the Indictment, nor the portion of the grand jury record submitted for *in camera* review, nor the Excerpts, violated the Speech or Debate Clause. *See id.* Accordingly, the court refused to dismiss the Indictment.

On February 20, 2008, seeking pretrial appellate review of his Speech or Debate Clause claim and the district court's refusal to dismiss on that basis, Jefferson filed his notice of appeal. As explained below, we possess jurisdiction under the collateral-order doctrine.

II.

We are always obligated to ascertain whether we possess jurisdiction of an appeal, an issue we assess de novo. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). We also review de novo a district court's denial of a claim that an indictment should be dismissed as violative of the Speech or Debate Clause. *See Minpeco, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C.

Cir. 1988); *see also United States v. Dowdy*, 479 F.2d 213, 221 (4th Cir. 1972). We review for abuse of discretion any issues arising from a trial court's rulings on the disclosure of grand jury materials. *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Anderson*, 481 F.2d 685, 692 (4th Cir. 1973).

III.

A.

As a settled proposition, a court of appeals is only empowered to review a district court's "final" decisions. 28 U.S.C. § 1291. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Interlocutory appellate review of a non-final decision of a district court is highly disfavored, particularly in a criminal case. *See Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."); *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) ("In criminal cases [the final-judgment rule] prohibits appellate review until after conviction and sentence.").

Acknowledging the absence of a final judgment, Jefferson relies on the collateral-order doctrine for jurisdiction in this appeal. This doctrine authorizes a court of appeals to review a non-final

decision of a district court when three requirements are satisfied. First, the issue sought to be appealed must conclusively determine the question; second, the question must constitute an important issue independent of the merits of the controversy; and third, the issue must be effectively unreviewable after trial. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949).

Of importance here, the Supreme Court "has found only three types of pretrial orders in criminal prosecutions to meet the requirements [of the collateral-order exception]. Each type involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Flanagan v. United States*, 465 U.S. 259, 265-66 (1984) (internal quotation marks omitted). The rights that have been deemed sufficient for a collateral-order appeal in a criminal proceeding are (1) the right to pretrial bail, *Stack v. Boyle*, 342 U.S. 1, 4 (1951); (2) the right not to be placed in double jeopardy, *Abney v. United States*, 431 U.S. 651, 659-60 (1977); and (3), as here, the right of a Member of Congress to avoid questioning based on the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979).

Nearly thirty years ago, in *Helstoski*, the Supreme Court concluded that an interlocutory appeal from a district court's refusal to dismiss an indictment for an alleged Speech or Debate Clause violation satisfies the collateral-order doctrine. *See*

442 U.S. at 506-08. As the Court explained, the denial of such a motion is, first of all, "'a complete, formal and, in the trial court, final rejection'" of the Speech or Debate Clause claim. *Id.* at 506 (quoting *Abney*, 431 U.S. at 659). Second, such a claim is "'collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged.'" *Id.* at 507 (quoting *Abney*, 431 U.S. at 659). Finally, in the absence of such an appeal, the Clause's protections would be lost, because "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burdens of defending themselves.'" *Id.* at 508 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). We thus possess jurisdiction, pursuant to the collateral-order doctrine, to review the denial of Jefferson's request to dismiss the Indictment.

B.

In this appeal, Jefferson contends that the district court erred in refusing to dismiss the Indictment.[6] In so contending, he maintains that the

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[6] There is some ambiguity regarding the scope of Jefferson's dismissal request. In his Motion, he "move[d] to dismiss all counts of the indictment obtained through use of privileged materials." J.A. 113. He later asserted that "all counts in the indictment that are based on bribery related schemes" should be dismissed. *Id.* at 159. In its Opinion, the district court observed that Jefferson had moved "to dismiss the indictment." *Jefferson*, 534 F. Supp. 2d at 654-55. In his brief

Speech or Debate Clause provides legislators with greater protection than the court recognized. Furthermore, Jefferson asserts that the court erred in not requiring the prosecutors to submit for *in camera* review the transcripts of any arguments or instructions the prosecutors may have given the grand jury. *See supra* note 5. These transcripts, Jefferson argues, could reveal additional evidence that Speech or Debate Clause materials were presented to the grand jury. Jefferson requests that we direct the dismissal of the Indictment, or, in the alternative, that we review the grand jury transcripts to search for Speech or Debate Clause infractions. At least, according to Jefferson, we should vacate the court's November 30, 2007 order and remand for an *in camera* assessment of any arguments or instructions offered by the prosecutors that may constitute Speech or Debate Clause violations.

In resolving this appeal, we first outline the scope of the protection that the Speech or Debate Clause affords a legislator implicated in a criminal proceeding. We then explain that Jefferson is not entitled to any further assessment of the grand jury

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on appeal, Jefferson again contends "[t]he question in this case is whether the bribery-related counts in the indictment should be dismissed." Br. of Appellant 17. Jefferson does not specify which counts he deems to be "bribery-related," nor does he identify those counts, if any, he accepts as valid. In these circumstances, we construe this appeal as challenging the Indictment in its entirety.

materials, and that the district court did not err in declining to dismiss the Indictment.

1.

The Speech or Debate Clause has a long history and is generally accepted as traceable to the English Bill of Rights of 1689. *See* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1120-35 (1973) (detailing history of legislative privilege); *see also* Joseph Story, *Commentaries on the Constitution* 309-10 (1833). Put simply, the Clause provides legislators with absolute immunity for their legislative activities, relieving them from defending those actions in court. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

The Supreme Court, however, has recognized that there are limits to the protection afforded legislators by the Speech or Debate Clause. In 1972, the Court explained that the Clause prohibits "inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 512 (1972). The Clause does not, however, bar an "inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.* at 528. Importantly, the Court has consistently emphasized that legislative immunity

does not shield a congressman or senator who has sought to improperly influence an executive department or agency. *See United States v. Johnson*, 383 U.S 169, 172 (1966) (recognizing that effort to influence Department of Justice is not legislative activity); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10, 131 (1979) (observing that efforts to influence executive agencies are not privileged).

In *Brewster*, the Supreme Court carefully surveyed the contours of the Speech or Debate Clause, concluding that the Clause does not prevent the prosecution from introducing, in a bribery proceeding, relevant evidence of a legislator's status. *See* 408 U.S. at 512. The Court explained that "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *Id.* In order to preserve "the historic balance of the three co-equal branches of Government," Chief Justice Burger explained, the privilege must have limits. *Id.* at 508. "The Speech or Debate Clause," he observed, "has been limited to an act which was clearly a part of the legislative process -- the *due* functioning of the process." *Id.* at 515-16. It is thus apparent that nonlegislative acts, such as making appointments with agencies, assisting constituents in securing government contracts, preparing newsletters or news releases, or making speeches outside Congress, are within the scope of an appropriate inquiry. *See id.* Most importantly, the acceptance of a bribe, as

the Court emphasized in *Brewster*, is never a legislative act. *See id.* at 526.

In this proceeding, Congressman Jefferson contends that the absolute immunity conferred by the Speech or Debate Clause bars the prosecution from presenting any evidence to the grand jury relating to his legislative activities. Under this interpretation of the Clause, *any* mention of Speech or Debate Clause material in a grand jury proceeding mandates the dismissal of all charged offenses that relate to such evidence. For this contention, Jefferson relies primarily on the Eleventh Circuit's decision in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992). Jefferson characterizes *Swindall* as holding that all charges in an indictment must be dismissed if "the legislative acts were relevant to the decision to indict." Br. of Appellant 29. The district court erred, Jefferson contends, because it failed to utilize this "relevancy" test in assessing the grand jury record. The Excerpts related to his involvement in legislation, Jefferson maintains, and were at the heart of the alleged bribery schemes. As such, they were relevant to the offenses alleged, and their presentation to the grand jury warranted dismissal of the Indictment.

In *Swindall*, the Eleventh Circuit assessed the convictions of a former congressman for making false statements to a grand jury investigating a money-laundering scheme. When the prosecutor questioned Swindall before the grand jury about his involvement in the scheme, Swindall denied knowing

that his activities were illegal. The prosecutor then inquired about Swindall's work on the Banking and Judiciary Committees, in an effort to use his committee involvement to show that Swindall knew of the relevant statutes. *See Swindall*, 971 F.2d at 1539-42. Following his grand jury appearance, Swindall was indicted on ten counts of perjury. He unsuccessfully sought dismissal of the charges and was convicted on all counts. Swindall appealed, claiming that the prosecution had violated the Speech or Debate Clause by relying on legislative acts to prove an element of the perjury offenses. The court of appeals reversed on three of the ten counts, ruling that those charges questioned Swindall's congressional activities. *See id.* at 1542. Such activities were legislative acts, which contravened the Speech or Debate Clause. *See id.* at 1543. It concluded that the Speech or Debate Clause barred the prosecution from using Swindall's legislative acts to prove any element of the alleged crimes. *See id.* at 1549.

Put succinctly, Jefferson's reliance on the *Swindall* decision is misplaced. Swindall was being prosecuted for perjury before the grand jury, and, at trial, the government introduced his committee memberships to prove that he had lied before the grand jury.[7] The government thus used his

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[7] In *Swindall*, the government acknowledged that the defendant's legislative activities were "critical" to the prosecution, explaining that "[u]nlike any other citizen in the United States, [Swindall] would have a unique and specific knowledge in the understanding of the illegality of the

legislative activities to prove an element of the perjury offenses. Jefferson has not contended that the Indictment references his legislative acts, or that a successful prosecution will require the government to prove such acts. In fact, he acknowledges that "[t]he indictment does not allege that he solicited payment in exchange for a decision on any pending bill, for an earmark or appropriation, or for action in a congressional investigation." Br. of Appellant 19. Jefferson maintains, however, that staffer testimony regarding his legislative activities renders the Indictment constitutionally defective. As explained below, we disagree.

2.

The principle of grand jury independence is firmly rooted and jealously protected in our federal system of justice. Because it is an independent investigative body, the federal courts have consistently accorded a grand jury "wide latitude to inquire into violations of criminal law." *United States v. Calandra*, 414 U.S. 338, 343 (1974). As the Supreme Court has explained, a grand jury

> is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by

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circumvention of the currency transaction reports because of his former status as a member of the House Judiciary and Banking Committee." *Swindall*, 971 F.2d at 1540.

> doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). Under controlling precedent, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege. *See Costello v. United States*, 350 U.S. 359, 363 (1956); *see also Calandra*, 414 U.S. at 344-345 (holding exclusionary rule inapplicable to grand jury proceedings); *Lawn v. United States*, 355 U.S. 339, 349-50 (1958) (concluding Fifth Amendment not violated when grand jury witnesses not advised of rights); *United States v. Strouse*, 286 F.3d 767, 772 (5th Cir. 2002) (holding that grand jury perjury, not sponsored by prosecution, provides no basis for dismissal of indictment).

In its *Costello* decision in 1956, the Supreme Court held that an otherwise valid indictment is not rendered invalid because it was predicated solely on hearsay evidence. *See* 350 U.S. at 363-64. In that case, Costello challenged his indictment for tax evasion, asserting that the only evidence heard and considered by the grand jury was inadmissible hearsay from the tax investigators. *See id.* at 359-61. Explaining that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act,"

the Court rejected Costello's challenge. *Id.* at 362. Writing for the Court, Justice Black made a comprehensive review of the grand jury's history in England and the United States. Recognizing that the Founders intended our system to operate in a manner similar to the grand jury in England, he explained that "[t]he basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Id.* As a result, the grand jury stands apart from other functions of government: "[I]n this country as in England of old," the Court observed, "the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Id.* In the context of this historical perspective, Justice Black reasoned that authorizing defendants to pursue pretrial challenges to grand jury procedures would serve to unduly delay criminal proceedings and foster abuse of the system. *See id.* at 363. As a result, when an indictment is facially valid and the grand jury was "legally constituted and unbiased," the competency and adequacy of the evidence presented to it is not subject to challenge. *Id.*

We have consistently adhered to Costello's guiding and settled principles. For example, in *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), in a context not unlike that presented here, we concluded that the *Costello* mandate barred us from looking behind an indictment to assess whether the grand jury had considered privileged legislative

materials. Johnson was a congressman who had been indicted under a federal conflict-of-interest statute. After he was convicted, Johnson appealed successfully, but was again convicted on retrial. In his second appeal, Johnson contended that his convictions were "invalid because the grand jury that returned them heard evidence concerning his Congressional speech." *Johnson*, 419 F.2d at 58. We rejected this contention, relying on the Supreme Court precedents that severely restrict any judicial inquiry into grand jury matters. *See id.* (citing *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966); *Lawn v. United States*, 355 U.S. 339 (1958); *Costello v. United States*, 350 U.S. 359 (1956); *Holt v. United States*, 218 U.S. 245 (1910)). In so doing, we emphasized that a grand jury will not be deemed biased solely because it heard some evidence relating to congressional speech. As Judge Butzner explained, the "[b]ias of a grand jury may be manifested in several ways, but it has not been held to arise from the receipt of incompetent or constitutionally impermissible evidence." *Id.* Bounded by such precedent, we are likewise not entitled to review the grand jury record in Jefferson's case -- the Indictment simply does not question any legislative acts.

Jefferson maintains, however, that our decision in *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973), permits us to look behind an Indictment when the Speech or Debate Clause may be implicated. In *Dowdy*, Judge Winter observed that "it may be necessary to go beyond the

indictment to obtain the full meaning of what appear facially to be perfectly proper allegations." *Dowdy*, 479 F.2d at 223. Although such language may initially appear to support Jefferson's contention, it actually fails to do so.

Dowdy involved a post-trial appeal by a Congressman who had accepted money from a Washington-area construction company in exchange for his intervention in a criminal investigation. Dowdy was indicted and convicted on two conspiracy charges, a bribery offense, and five counts of perjury before a grand jury. *See Dowdy*, 479 F.2d at 216-17. On appeal, he alleged that "various counts of the indictment and a substantial part of the government's proof offered thereunder" contravened the Speech or Debate Clause. *Id.* at 222. Our panel concluded that the indictment, when "read standing alone," was largely unobjectionable. *Id.* It admonished, however, that "the validity of an indictment must be determined in the context of the proof which is offered to sustain it, or in the context of facts adduced on a motion to dismiss it." *Id.* at 223. It was in this context that we referred to "go[ing] beyond the indictment," observing that

> we think that the speech or debate clause constitutes a limitation on what may be alleged as well as what may be proved, although *it may be necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations.*

Id. (emphasis added). In other words, we recognized that it may be appropriate to look beyond a facially valid indictment to ascertain whether Speech or Debate Clause material is necessary to prove the charges. Concluding that the trial evidence used to obtain Dowdy's convictions infringed the Speech or Debate Clause, we vacated his convictions on five of the indictment's eight counts. *See id.* at 217.

Importantly, *Dowdy* did not purport to circumvent *Costello* and its progeny, or to rule that a court should look behind an otherwise valid indictment for Speech or Debate Clause materials that may have been presented to a grand jury. Indeed, *Dowdy* was a post-trial appeal, and we had no reason to consider *Costello*. *Dowdy* simply recognized that a court may examine the relevant trial evidence or the facts adduced in connection with a motion to dismiss to assess whether a facially valid indictment nonetheless contravenes the Speech or Debate Clause. What we found offensive in *Dowdy* was not that the grand jury may have considered legislative acts, but that proof of such acts was actually presented *at trial*. *See* 479 F.2d at 223. *Dowdy* is thus not controlling where, as here, there is no allegation that proof of the indictment requires the presentation at trial of Speech or Debate Clause materials.[8]

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[8] At least two of our sister circuits have observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment. *See United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C.

In these circumstances, we are satisfied that the district court, in conducting the pretrial proceedings, accorded Congressman Jefferson every substantive and procedural protection to which he was entitled. As the court explained in its Opinion, it decided to analyze the Excerpts and review *in camera* certain grand jury materials "because the Speech or Debate Clause protection afforded legislators is so important, and *out of an abundance of caution*." *United States v. Jefferson*, 534 F. Supp. 2d 645, 649 (E.D. Va. 2008) (emphasis added). After conducting its review, the court concluded that the grand jury had not considered any Speech or Debate Clause material. *See id.* at 654. The court acknowledged, however -- and we agree -- that the controlling authorities did not compel such a comprehensive review. *See id.* at 649. Under the facts of this case, however, the court's decision to act as it did in assessing Jefferson's Speech or Debate Clause Claim was within its discretion and entirely appropriate. With the foregoing principles in mind, we are content to reject Jefferson's request for further review of the grand jury record, and we affirm the district court's refusal to dismiss the Indictment.

Cir. 1995); *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980). Jefferson has made no such assertion, however, and we have no reason to reach such an issue.

IV.

Pursuant to the foregoing, the Opinion of the district court is affirmed.

AFFIRMED

APPENDIX B

FILED: December 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4215
(1:07-cr-00209-TSE-1)

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

WILLIAM J. JEFFERSON,
Defendant - Appellant

CITIZENS FOR RESPONSIBILTY
AND ETHICS IN WASHINGTON,
Amicus Supporting Appellee

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Case No. 1:07cr209

UNITED STATES OF AMERICA,

v.

WILLIAM J. JEFFERSON
Defendant.

ORDER

This matter is before the Court on defendant's motion for review grand jury materials and to dismiss all counts of the indictment obtained through the use of materials privileged by the Speech or Debate Clause, U.S. Const. Art. I, §6, cl.1.

For the reasons stated from the Bench and to be elucidated in a forthcoming memorandum opinion, and for good cause,

It is ORDERED that defendant's motion for review of grand jury materials and to dismiss is DENIED.

It is further ORDERED that, in light of defendant's right to appeal this Order within ten days pursuant to Rule 4(b)(1)(A), Fed. R. App. P., the government's obligation to produce materials pursuant to 18 U.S.C. § 3500, and both parties' obligation to file proposed jury instructions, are

POSTPONED pending further Order, except that if no appeal of this Order is taken within ten days, Jencks material must be produced, and proposed jury instructions must be filed, by 5:00 p.m. on the next business day following expiration of the appeal period.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
February 6, 2008

/s/ T. S. Ellis, III

T. S. Ellis, III
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Case No. 1:07cr209

UNITED STATES OF AMERICA,

v.

WILLIAM J. JEFFERSON
Defendant.

MEMORANDUM OPINION

In this sixteen-count prosecution, the government charges defendant William J. Jefferson, a sitting member of the United States House of Representatives, with a variety of crimes including conspiracy, wire fraud, foreign corrupt practices, money laundering, obstructing justice, racketeering, and soliciting bribes. Among the numerous pretrial motions filed by defendant is the motion now before the Court to review grand jury materials and to dismiss the indictment on the ground that the indictment was returned on the basis of information privileged by the Speech or Debate Clause, U.S. Const. Art I, § 6, cl. 1. The matter was fully briefed and argued, and a bench ruling and Order issued denying defendant's motion. *United States v. Jefferson*, 1:07cr209 (E.D. Va. Feb. 6, 2008) (Order).

This Memorandum Opinion incorporates and elucidates the reasons for the denial of defendant's motion.

I.

Defendant is the currently sitting Member of the United States House of Representatives representing Louisiana's 2nd Congressional District, an office he has held since 1991. The indictment alleges that beginning in or about January 2001, defendant used his office to advance the business interests of various individuals and corporations in return for money and other things of value paid either directly to defendant or via 'nominee companies,' that is, companies ostensibly controlled by one of defendant's family members but in fact controlled by defendant himself. More specifically, the indictment alleges seven bribery schemes, each of which merits brief description here.

First, the indictment alleges that defendant solicited bribes from Vernon Jackson, president of iGate, Incorporated (iGate), a Louisville, Kentucky-based telecommunications firm, to promote iGate's telecommunications technology in certain African countries. In return for payments of money and iGate shares to the ANJ Group, L.L.C. (ANJ), a Louisiana limited liability company ostensibly controlled and managed by defendant's spouse, Andrea Jefferson, defendant allegedly sent letters on official letterhead, conducted official travel, and met

with foreign government officials to promote the use of iGate's technology.

Second, the indictment alleges that defendant solicited bribes from Netlink Digital Television (Netlink), a Nigerian corporation that was pursuing a telecommunications venture in Nigeria and elsewhere in Africa. In return for a share of revenue, stocks, and fees from Netlink, defendant allegedly performed various official acts including meeting with Nigerian government officials to promote Netlink's business.

Third, the indictment alleges that defendant induced Lori Mody, an Alexandria, Virginia-based businesswoman, to finance a telecommunications project in Africa using iGate's technology. Defendant allegedly solicited bribes from Mody in the form of shares in W2-IBBS, a Nigerian company formed by Mody to pursue the Nigerian telecommunications project, as well as money to be paid to defendant's family members. In return for these bribes, defendant allegedly used his office to promote W2-IBBS's interests in Nigeria and elsewhere in Africa. Defendant also allegedly solicited bribes in the form of shares in IBBS, a Ghanian company formed by Mody to pursue the telecommunications project in that country. In return, defendant allegedly sent letters on official letterhead, conducted official travel to Ghana, and met with Ghanian government officials to promote Mody's, IBBS's, and W2-IBBS's interests in Ghana and elsewhere in Africa. The indictment also alleges that to advance this bribery

scheme, defendant introduced Mody to officials of the Export-Import Bank of the United States (Ex-Im Bank)[1] to assist Mody in securing financial assistance. Defendant and Mody also allegedly discussed bribing Nigerian government officials to facilitate the W2-IBBS telecommunications project. It is further alleged that defendant then met with and offered to bribe Atiku Abubakar, who was then the Vice President of Nigeria. And, according to the indictment, defendant received $100,000 in cash from Mody for the purpose of paying Abubakar a bribe.

Fourth, the indictment alleges that defendant solicited and received bribes from businessman George Knost and from Arkel International, Inc., Arkel Sugar, Inc., and Arkel Oil and Gas, Inc. In return for the bribes, defendant allegedly performed various official acts, including meeting with officials of the Ex-Im Bank to promote an Arkel Sugar project in Nigeria and meeting with Nigerian government officials to promote the interests of Arkel Oil and Gas.

Fifth, the indictment alleges that defendant solicited and received bribes from businessman John Melton and from TDC Energy Overseas, Inc. (TDC). In return for these bribes, defendant allegedly

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[1] The Ex-Im Bank is an agency established by Congress "to assist in financing the export of U.S. goods and services to international markets." *About Ex-Im*, http://www.exim.gov/about/mission.cfm (last visited Feb. 8, 2008).

performed various official acts, including meeting with Nigerian government officials to promote TDC's interests in Nigeria and meeting with officials of the United States Trade Development Agency (USTDA)[2] to encourage the USTDA to grant TDC financial assistance for TDC's Nigerian oil field project.

Sixth, the indictment alleges that defendant, through an intermediary, lobbyist James Creaghan, solicited bribes from businesswoman Noreen Wilson in return for which defendant used his office to assist in resolving a dispute over oil exploration rights in the waters off Sao Tome and Principe. It is alleged that defendant received payments from Wilson, via Creaghan, either directly or through a nominee company.

Seventh, the indictment alleges that defendant solicited and received bribes from Life Energy Technology Holdings (LETH), a Delaware corporation engaged in the business of manufacturing and distributing energy-related technology. In return for these bribes, it is alleged that defendant traveled in his official capacity to Nigeria, Equatorial Guinea, Cameroon, and Sao Tome and Principe and met with government officials in those countries to promote LETH's technology to those government officials.

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[2] The USTDA was established by Congress to promote private sector development projects in foreign nations. *See About USTDA*, http://www.ustda.gov/about (last visited Feb. 8, 2008)

Based on these alleged facts, the indictment charges defendant with sixteen counts of wrongdoing: conspiracy to solicit bribes, deprive citizens of honest services by wire fraud, and violate the Foreign Corrupt Practices Act (Counts 1 & 2); solicitation of bribes by a public official (Counts 3 & 4); deprivation of honest services by wire fraud (Counts 5-10); violation of the Foreign Corrupt Practices Act (Count 11); money laundering (Counts 12-14); obstruction of justice (Count 15); and racketeering (Count 16).

Defendant has filed a number of pretrial motions challenging various aspects of the indictment and the prosecution.[3] Among these motions is defendant's motion for review of materials presented to the grand jury and to dismiss the indictment based on defendant's belief that the grand jury returned the indictment in reliance on

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[3] These motions include (i) a motion to dismiss conspiracy Counts 1 & 2, which was denied, *United States v. Jefferson*, 1:07cr209 (E.D. Va. Nov. 30, 2007) (Order); (ii) a motion to dismiss bribery Counts 3 & 4, which remains under advisement; (iii) a motion to dismiss wire fraud Counts 5-10, which remains under advisement; (iv) a motion to dismiss RICO Count 16, which remains under advisement; (v) a motion to dismiss Counts 2, 3, 10, and 12-14 for lack of venue, which was denied, *United States v. Jefferson*, 1:07cr209 (E.D. Va. Nov. 30, 2007) (Order); (vi) a motion to strike surplusage from the indictment, which was denied, *United States v. Jefferson*, 1:07cr209 (E.D. Va. Nov. 30, 2007) (Order); and (vii) motions to suppress evidence seized from defendant's New Orleans residence and Congressional office and to suppress statements made to FBI agents prior to the search of the residence, which remain under advisement.

materials privileged by the Speech or Debate Clause. Defendant believes that the grand jury testimony of his congressional aides would have impermissibly included Speech or Debate Clause materials. In response, the government filed a pleading representing that no Speech or Debate material had been presented to the grand jury. In support of this representation, the government specifically stated that Brett Pfeffer, a former member of defendant's congressional staff who entered into a plea agreement with the United States in return for his cooperation in this prosecution, did not testify before the grand jury. The government also specifically represented that recordings of conversations between Pfeffer and Mody were not presented to the grand jury. Additionally, the government allowed defense counsel to review, in the offices of the United States Attorney, the grand jury testimony transcripts of seven former and current members of defendant's congressional staff. The government did so in an attempt to allay defendant's concerns that Speech or Debate Clause material was presented to the grand jury for purposes of obtaining an indictment.

Following review of these transcripts, defendant filed a reply memorandum identifying three specific excerpts of the grand jury transcripts made available by the government which, in defendant's view, contain Speech or Debate material. The government filed a sur-reply memorandum arguing that the passages in the grand jury testimony identified by defendant did not reflect an

infringement of the Speech or Debate Clause. And finally, defendant had the last word in this regard by filing yet another memorandum disputing the government's position.

Oral argument on this matter was heard on November 30, 2007. To begin with, defendant's request for disclosure of the grand jury record to defense counsel was denied by a bench ruling. Although courts are authorized to disclose grand jury matters to a "defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury,"[4] no such ground was shown here. The indictment's allegations neither reflect nor implicate Speech or Debate matters; to the contrary, the indictment alleges and describes criminal conduct that falls well outside the Speech or Debate Clause protection.

Defendant's request for an *in camera* review warranted denial for the same reasons. Courts have sensibly concluded that *in camera* inspection of grand jury matters is required only on a showing that there is a reason to believe Speech or Debate materials were presented to the grand jury.[5] There has been no such showing here. Yet because the

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[4] Rule 6(e)(3)(E)(ii), Fed. R. Crim. P.

[5] *United States v. Rostenkowski*, 59 F.3d 1291, 1313 (D.C. Cir. 1995) (*In camera* review of grand jury materials required only on Member of Congress's showing that there is reason to believe Speech or Debate materials were presented to grand jury); *United States v. Kolter*, 71 F.3d 425, 429-30 (D.C. Cir. 1995) (same).

Speech or Debate Clause protection afforded legislators is so important, and out of an abundance of caution, the government was directed to submit the grand jury record for *in camera* review.

The materials the government submitted for *in camera* review consist of a substantial number of witness testimony transcripts and document exhibits.[6] The government has confirmed that the materials submitted constitute the entire grand jury record that led to the issuance of the indictment in this matter.[7] Following completion of the *in camera* review, a bench ruling and Order issued denying defendant's motion to dismiss.[8] This Memorandum Opinion records the reasons for the ruling, first elucidating the nature and scope of the Speech or Debate Clause immunity, as this served as the lens through which the *in camera* inspection proceeded, and then stating the conclusions of the *in camera* review and addressing defendant's specific arguments.

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[6] Rule 6, Fed. R. Crim. P. precludes a more detailed description of the record, including the number of witness transcripts and the number and nature of the exhibits.

[7] The only exception, as the government has acknowledged, is the Assistant United States Attorney's instructions and arguments to the grand jury, which were not transcribed and are not available.

[8] *United States v. Jefferson*, 1:07cr209 (E.D. Va. Feb. 6, 2008) (Order).

II.

The Constitution's Speech or Debate Clause has a distinguished pedigree, and the principle it embodies has roots that long predate the Constitution.[9] It states, with elegant simplicity, that:

> "[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."[10]

By its plain terms, the Clause confers absolute immunity on Members of Congress for their legislative activities. The importance of this immunity is manifest. As Justice Joseph Story recognized in his famous *Commentaries on the Constitution*, this is a "great and vital privilege . . . without which all other [congressional] privileges

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[9] For instance, the English Bill of Rights, a product of the sixteenth and seventeenth century struggles between crown and parliament, explicitly provided "[t]hat the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 W. & M., 2d Sess., c. 2, 16 Dec. 1689. A century later the same guarantee was incorporated in the Articles of Confederation, which guaranteed that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress." Articles of Confederation, Art. 5.

For other pre-constitutional applications of the Speech or Debate privilege, see *Holiday v. Pitt*, 93 Eng. Rep. 984 (K.B. 1734) (legislative privilege required release of Member of Parliament arrested two days after dissolution of Parliament); 1 William Blackstone, *Commentaries* 159-61.

[10] U.S. Const. Art. I, § 6, cl. 1.

would be comparatively unimportant, or ineffectual."[11] Similarly, the Supreme Court later noted that the purpose of the Speech or Debate Clause, and of similar clauses that then appeared in every state's constitution, is "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."[12] In this respect, the Speech or Debate Clause immunity for Members of Congress is akin to the judicial independence conferred by the Constitution on the federal judiciary by way of life tenure.[13] It is also worth nothing that the Speech or Debate Clause protects Members of Congress "not only from the consequences of litigation's results but also from the

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[11] Joseph Story, 2 *Commentaries on the Constitution* § 863 (1833).

[12] *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880) (quoting *Coffin v. Coffin*, 4 Mass. 1 (1808)). The Supreme Court would later make the same point in slightly different terms, saying that the purpose of the Speech or Debate Clause is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" by "insuring the independence of individual legislators." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (citations omitted).

[13] Similarly, and more directly analogous to Speech or Debate immunity, the Supreme Court has long recognized judges' official immunity from suit for judicial acts. *See Bradley v. Fisher*, 80 U.S. 335, 351-52 (1871); *see also Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine [in *Bradley*].").

burden of defending themselves" regarding their legislative activities.[14] And because the Clause creates an absolute immunity from suit, the denial of a motion to dismiss an indictment on Speech or Debate Clause grounds may be appealed immediately lest the Member of Congress be forced to defend himself or herself against unconstitutional charges.[15]

For the task at hand, it is, of course, necessary to define the scope of the immunity conferred on Members of Congress by the Speech or Debate Clause. In this regard the Supreme Court, acknowledging the importance of the immunity conferred on Members, has stated that the Clause must be interpreted "broadly to effectuate its purpose."[16] In other words, the boundaries of the immunity conferred by the Clause are defined and limited by the purpose of the Clause. The grant of immunity extends only so far as may be necessary to effectuate the purpose the Clause is intended to

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[14] *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (affirming dismissal of civil complaint against senator based on his activities as chairman of a Senate subcommittee); *see also United States v. Dowdy*, 479 F.2d 213, 221 (4th Cir. 1973) (reversing in part former congressman's conviction based on his activities as chairman of House subcommittee).

[15] *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979) (challenge to validity of indictment on Speech or Debate Clause grounds properly brought by direct interlocutory appeal rather than writ of mandamus following conviction).

[16] *United States v. Johnson*, 383 U.S. 169, 180 (1966) (affirming reversal of former congressman's conviction based on substance of and motivation for speech in the House of Representatives).

serve. This purpose is well-defined: it is to ensure that Members of Congress are able to perform their legislative functions unburdened by fear of civil suit or criminal arrest and prosecution.[17] Accordingly, the privilege applies only to those activities integral to a Member's legislative function,[18] *i.e.* activities that are integral to the Member's participation in the drafting, consideration, debate, and passage or defeat of legislation.[19] And because the scope of the Speech or Debate Clause is limited to legislative activities, it follows that the privilege does not extend to a Member's non-legislative actions. The Supreme Court has explicitly recognized this point, noting:

> [T]he Clause has not been extended beyond the legislative sphere. That [Members of Congress] generally perform certain acts in their official capacity as [Members of Congress] does not necessarily make all such acts legislative in nature. Members of

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[17] *See Kilbourn*, 103 U.S. at 204; *Eastland*, 421 U.S. at 502.

[18] *See Kilbourn*, 103 U.S. 204 (Speech or Debate Clause applies "to things generally done in a session of the House by one of its members in relation to the business before it."); *see also United States v. Brewster*, 408 U.S. 501, 513-514 (1972) (holding that Speech or Debate Clause protects "acts generally done in the course of the process of enacting legislation" and reversing dismissal of bribery indictment where conviction would not require inquiry into legislative acts).

[19] *United States v. Gravel*, 408 U.S. 606, 625 (1972) (vacating protective order limiting questioning of senator's aide regarding publication of classified information).

> Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies . . . but such conduct, though generally done, is not protected legislative activity.[20]

Because the Clause's protection does not extend beyond the legislative sphere, it follows that the Clause does not confer immunity on a Member for the Member's criminal conduct, including conspiracy, solicitation of bribes, wire fraud, violations of the Foreign Corrupt Practices Act, money laundering, obstruction of justice, or racketeering. Of course it is well settled that the government may not introduce evidence of a Member's legislative acts to prove an element of a criminal charge.[21] But the government may rely on acts "casually or incidentally related to legislative affairs but not part of the legislative process itself."[22] Put simply, the Speech or Debate Clause is not a license to commit crime.

The *in camera* review of the grand jury material submitted by the government was conducted with these principles in mind, that is, with an eye toward detecting whether activities integral to defendant's

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[20] *Id.* at 624-25.

[21] *Johnson*, 383 U.S. at 184-85 ("[A] prosecution under a general criminal statute dependant on such inquiries [into legislative acts and their motivation] necessarily contravenes the Speech or Debate Clause"). *Dowdy*, 479 F.2d at 221 (same).

[22] *Brewster*, 408 U.S. at 528.

participation in the consideration and passage of legislation played a role in obtaining the indictment.

III.

The grand jury record leading to defendant's indictment, reviewed through the lens of the principles stated in Part II, discloses no infringement of the Speech or Debate Clause in the issuance of the indictment. This conclusion is reflected in the indictment itself, as the schemes and facts alleged therein — meeting with American and foreign government officials to promote private business ventures in return for bribes, performing official travel to promote private business ventures in return for bribes, and making use of his congressional staff to promote private business ventures in return for bribes — do not concern defendant's involvement in the consideration and passage or rejection of legislation.[23] Not surprisingly, the grand jury record reviewed focuses sharply on these allegedly criminal non-legislative activities.

To be sure, the grand jury materials submitted for review do contain references to defendant's status as a congressman and as a

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[23] In fact, the Supreme Court has specifically identified contact with executive branch officials as activity within the official capacity of a Member of Congress that does not qualify for Speech or Debate protection. *Gravel*, 408 U.S. at 624-625.

member of various congressional committees.[24] Yet mere reference in the indictment to defendant's status as a Member of Congress does not offend the Speech or Debate Clause provided, of course, that neither the indictment nor the prosecution entails inquiry into defendant's participation in the consideration and passage of legislation. Settled authority confirms this point. The Third Circuit addressed this precise point in *United States v. McDade*.[25] Writing for that court, Justice Alito — then Judge Alito — wrote that "the Speech or Debate Clause not require dismissal of any count of the indictment simply because it refers to the defendant's status as a member or ranking member of [a] congressional committee[]."[26] Although *McDade* addresses a reference to a Member of Congress's status in an indictment, it follows for the same reasons that mere reference to status in grand jury proceedings also does not offend the Clause.

Defendant has identified three excerpts of grand jury testimony, contained in the transcripts made available by the government for defense counsel's review, that defendant argues contain Speech or Debate material. First, defendant cites the

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[24] For instance, among the exhibits made available to the grand jury was a biography of defendant printed from his congressional website.

[25] *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (affirming denial of congressman's motion to dismiss indictment which referred to congressman's status as a member of congressional committees).

[26] *McDade*, 28 F.3d at 291.

following exchange between the Assistant United States Attorney and Stephanie Butler, a member of defendant's staff:

> Q. The congressman, through his activities in Congress, has a special knowledge of West Africa, you know, countries in Subsaharan Africa, Gulf of Guinea area. Are you familiar with work he's done on behalf of companies trying to do business in Africa?
>
> A. Not too much, no.

Once again, settled authority makes clear that the Assistant United States Attorney's reference to defendant's "activities in Congress" does not violate the Speech or Debate Clause where, as here, it is simply part of a more general inquiry into matters that are incidentally related to a congressman's legislative activities. The *Brewster* Court stated in unequivocal terms that "[t]he only reasonable reading of the [Speech or Debate] Clause . . . is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself."[27] Nothing in the question or the witness's answer required the grand jury to inquire into defendant's involvement in the consideration and passage or rejection of any legislation. To the contrary, the Assistant United States Attorney's inquiry simply

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[27] *Brewster*, 408 U.S. at 528.

relates to defendant's influence and status, matters only incidentally related to defendant's past legislative activities that may be relevant to the motivation some persons might have to bribe defendant, as alleged in the indictment. In summary, the Assistant United States Attorney's reference to defendant's activities in Congress does not violate the Speech or Debate Clause here because defendant is not being questioned in this proceeding about his legislative activities in Congress.

Second, defendant cites an exchange between the Assistant United States Attorney and Melvin Spence, a former member of defendant's congressional staff:

> Q. Was Congressman Jefferson seen as a leader in a particular area of trade by constituents, as far as you know?
>
> A. Africa would be the closest thing. Like AGOA, the Africa Growth and Opportunity Act, which is a preferential trade bill.

Defendant argues that Spence's reference to the AGOA, upon which defendant deliberated and voted as a Member of Congress, violates the Speech or Debate Clause. This argument fails for essentially the same reasons as did the previous argument. Significantly, Spence's reference to the AGOA was not a reference to defendant's involvement in the

consideration and passage of the Act. Instead, the reference was to another aspect of defendant's status and experience that might induce persons to offer him bribes in return for official acts. Put simply, defendant is not being made to answer for his involvement in the consideration and passage or rejection of any piece of legislation.

Defendant argues that because his expertise related to the AGOA was derived from his legislative acts, reference to the expertise violates the Speech or Debate Clause. This argument eviscerates the carefully drawn distinction between legislative acts and matters only incidentally related to legislative affairs.[28] All of a Member's expertise, influence, and even status derive, ultimately, from his or her legislative acts, and of course a Member's status and influence as a Member of Congress are precisely the incentive and reason a person may seek to offer him bribes. As the government has correctly pointed out, defendant's argument, if accepted, would effectively immunize a Member of Congress from all scrutiny regarding any activity conducted during his or her term of office. Speech or Debate immunity does not apply so broadly.[29]

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[28] *Id.*

[29] *See Gravel*, 408 U.S. at 624-625 (Speech or Debate Clause does not apply to Congressman's non-legislative official acts); *Brewster*, 408 U.S. at 528 (Speech or Debate Clause does not prohibit inquiry into matters "not a part of the legislative process itself.").

Third, defendant cites the testimony of Lionel Collins regarding a 1997 trip by defendant to Nigeria. In response to a question regarding defendant's relationships with Nigerian government officials, Collins gave a long discursive answer, apparently attempting to trace the roots of whatever relationships he believed defendant did have. In the course of his answer Collins made reference to defendant's participation in "moving the legislation [namely AGOA] through the Congress" which resulted in relationships with "African leaders." Defendant argues that this reference to his role in passing the AGOA violates the Speech or Debate Clause. While a Member's role in passing legislation is the sort of legislative activity protected by the Clause, the reference cited here is no infringement of the Clause. Collins's reference to defendant's role in securing passage of the AGOA is neither material nor relevant to the criminal conduct alleged in the indictment. Put differently, defendant is not being questioned in this proceeding about his vote or role in the AGOA legislation. Moreover, settled precedent holds that a reference to privileged activity does not render an indictment — or grand jury proceeding — constitutionally infirm, provided there are independent, non-privileged grounds sustaining the charges in the indictment.[30] Moreover, Collins's

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[30] *See McDade*, 28 F.3d at 300 ("Even if we were to hold, however, that both of the overt acts in question are invalid [under the Speech or Debate Clause], no charge in the indictment would have to be dismissed. Both counts . . . allege numerous other overt acts, and an indictment under [the operative statute] need only allege one overt act.").

statement was unprompted; it did not result from an inquiry into defendant's legislative activities, and it did not result in any further inquiry into legislative activities by the Assistant United States Attorney or the grand jury.[31]

In summary, the *in camera* review revealed no material integral to defendant's consideration or vote upon any piece of legislation. Neither the references to defendant's status in the grand jury materials nor the passages cited by defendant from the transcripts made available to defense counsel constitute an infringement of the Speech or Debate Clause that would require dismissal of the indictment. Accordingly, defendant's motion for review of grand jury material and to dismiss the indictment insofar as it is based on Speech or Debate material must be denied.

An appropriate order has issued.

Alexandria, Virginia
February 13, 2008

/s/ T. S. Ellis, III

T. S. Ellis, III
United States District Judge

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[31] *See Brewster*, 408 U.S. at 526. ("The question is whether it is necessary to inquire into how [Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute.")

No. 08-1059

In the Supreme Court of the United States

WILLIAM J. JEFFERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a facially valid indictment against a former Member of Congress was subject to dismissal based on petitioner's claim that the grand jury heard evidence that was privileged under the Speech or Debate Clause.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 546 F.3d 300. The opinion of the district court (Pet. App. 36a-56a) is reported at 534 F. Supp. 2d 645.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A petition for rehearing was denied on December 12, 2008 (Pet. App. 33a). The petition for a writ of certiorari was filed on February 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Eastern District of Virginia returned a 16-count indictment against petitioner,

who was then a Member of the United States House of Representatives. Pet. App. 36a. The indictment charges petitioner with one count of conspiring to solicit bribes while serving as a public official, deprive citizens of honest services by wire fraud, and violate the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*, in violation of 18 U.S.C. 371; one count of conspiring to solicit bribes while serving as a public official and deprive citizens of honest services by wire fraud, in violation of 18 U.S.C. 371; two counts of soliciting bribes while serving as a public official, in violation of 18 U.S.C. 201(b)(2)(A); six counts of wire fraud, in violation of 18 U.S.C. 1343 and 1346; one count of violating the Foreign Corrupt Practices Act of 1977, in violation of 15 U.S.C. 78dd-2(a); three counts of money laundering, in violation of 18 U.S.C. 1957; one count of obstructing justice, in violation of 18 U.S.C. 1512(c)(1); and one count of racketeering, in violation of 18 U.S.C. 1962(c). C.A. App. 19-112. Petitioner moved to dismiss 14 of the 16 counts of the indictment. *Id.* at 113-128; see Pet. 9, 21 n.8. The district court denied that motion, Pet. App. 36a-56a, and the court of appeals affirmed on interlocutory review, *id.* at 1a-32a.

1. The indictment alleges that, from January 2001 to August 2005, petitioner engaged in "seven separate bribery schemes." C.A. App. 30; see Pet. App. 3a. First, the indictment alleges that petitioner solicited bribes from Vernon Jackson, the president of iGate Incorporated (iGate), a Kentucky-based corporation, to promote iGate's telecommunications technology in certain African countries. In return for payments of money and iGate shares to a company controlled by his spouse, petitioner sent letters on official letterhead, conducted offi-

cial travel, and met with foreign government officials to promote iGate's technology. *Id.* at 4a.

Second, the indictment alleges that petitioner solicited bribes from Netlink Digital Television (Netlink), a Nigerian corporation that was pursuing a telecommunications venture in Nigeria and elsewhere in Africa. In return for stock, fees, and a share of Netlink's revenue, petitioner performed various official acts, including meeting with Nigerian government officials to promote Netlink's business. Pet. App. 4a.

Third, the indictment alleges that petitioner induced Lori Mody, a Virginia-based businesswoman, to finance a telecommunications project in Africa using iGate's technology. According to the indictment, petitioner solicited bribes from Mody in the form of money and shares in companies she controlled. In return, petitioner promoted Mody's companies in Nigeria and Ghana, sent letters on official letterhead, conducted official travel, met with and offered to bribe foreign officials, and introduced Mody to officials of the Export-Import Bank of the United States (Ex-Im Bank), from which Mody sought financial assistance. Pet. App. 4a-5a.

Fourth, the indictment alleges that petitioner solicited and received bribes from businessman George Knost and various companies with which Knost was affiliated. In return, petitioner met separately with officials of the Ex-Im Bank and Nigerian government officials to promote the interests of Knost's companies. Pet. App. 6a.

Fifth, the indictment alleges that petitioner solicited and received bribes from businessman John Melton and TDC Energy Overseas, Inc. (TDC). In return, petitioner performed various official acts, including meeting with Nigerian officials to promote TDC's business and

meeting with officials of the United States Trade Development Agency (Agency) to encourage the Agency to grant TDC financial assistance for TDC's Nigerian oil field project. Pet. App. 6a.

Sixth, the indictment alleges that petitioner used an intermediary to solicit, and in fact received, bribes from businesswoman Noreen Wilson. In return, petitioner used his office to assist in resolving a dispute over oil exploration rights in the waters off Sao Tome and Principe. Pet. App. 6a.

Seventh, the indictment alleges that petitioner solicited and received bribes from Life Energy Technology Holdings, a Delaware corporation. In return, petitioner conducted official travel to various countries and met with government officials to promote the company's technology. Pet. App. 7a.

2. a. Before trial, petitioner filed a motion requesting that the government be directed to provide all grand jury materials to his attorneys so that they could assess whether evidence of his legislative acts had been presented to the grand jury in violation of the Speech or Debate Clause of the United States Constitution (U.S. Const. Art. I, § 6, Cl. 1). Petitioner also requested that the district court conduct an *in camera* review of all grand jury transcripts for the same purpose. Petitioner asserted that, if evidence about his legislative acts had been presented to the grand jury, and if such evidence had been relevant to the grand jury's decision to indict, the district court was obligated to dismiss the indictment. Pet. App. 8a-9a.

In its response to petitioner's motion, the government denied that the grand jury had heard or considered any Speech or Debate Clause material and asserted that it was not obligated to disclose any material from

the grand jury proceedings. Pet. App. 9a; C.A. App. 152-154. Nevertheless, "[o]ut of an abundance of caution," the government took two steps to assuage petitioner's concerns. Pet. App. 9a. First, the government informed petitioner that a certain former staffer had not testified before the grand jury and that certain recorded statements by that staffer had not been presented to the grand jury. Second, the government made available to petitioner more than 600 pages of grand jury transcripts by petitioner's current and former staff members. *Id.* at 9a & n.4.

b. After reviewing the transcripts, petitioner identified three excerpts that he alleged violated the Speech or Debate Clause. The first excerpt was from the testimony of Lionel Collins, petitioner's former chief of staff, who testified that petitioner was "very instrumental in moving the [African Growth and Opportunity Act (AGOA), 19 U.S.C. 3701 *et seq.*,] through the Congress." Pet. App. 9a-10a; see C.A. App. 181-183. The second excerpt was from the testimony of Melvin Spence, a former staff member, who testified that petitioner was a leader in the area of African trade and cited as an example "the African Growth and Opportunity Act." Pet. App. 9a-10a. The third excerpt was from the examination of Stephanie Butler, a then-current staff member. During Butler's examination, a prosecutor prefaced a question by stating that petitioner, "through his activities in Congress, has a special knowledge of West Africa." *Id.* at 9a-11a.

c. The district court denied petitioner's request for an order directing disclosure of all grand jury transcripts to defense counsel. The district court also denied petitioner's request that it conduct an *in camera* review of the entire grand jury record. The district court

agreed, however, to conduct an *in camera* review of all grand jury materials that had not been provided to petitioner, with the exception of any arguments or instructions offered to the grand jury by the prosecutors, which had not been transcribed and were not available. Pet. App. 11a & n.5, 44a n.7.

d. After reviewing the remaining transcripts, the district court denied petitioner's motion to dismiss the indictment. Pet. App. 36a-56a. The court first concluded that petitioner had no legal entitlement to have any grand jury material provided to defense counsel or to have the court itself conduct an *in camera* review. The district court acknowledged that "courts are authorized to disclose grand jury matters to a 'defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.'" *Id.* at 43a (quoting Fed. R. Crim. P. 6(e)(3)(E)(ii)). But the court determined that "no such ground was shown here" because "[t]he indictment's allegations neither reflect nor implicate Speech or Debate matters." *Ibid.* The court also stated that petitioner's "request for *in camera* review warranted denial" because petitioner had made "no [threshold] showing" that there was "reason to believe Speech or Debate materials were presented to the grand jury." *Ibid.* The district court stated that it had conducted its *in camera* review of the grand jury materials only "because the Speech or Debate Clause protection afforded legislators is so important, and out of an abundance of caution." *Id.* at 43a-44a.

The district court explained that the Speech or Debate Clause "applies only to those activities integral to a Member's legislative function, *i.e.*, activities that are integral to the Member's participation in the drafting,

consideration, debate, and passage or defeat of legislation." Pet. App. 48a (footnote omitted). The court further explained that Speech or Debate immunity "does not extend to a Member's non-legislative actions" and "is not a license to commit crime." *Id.* at 48a-49a. The court stated that "it is well settled that the government may not introduce evidence of a Member's legislative acts to prove an element of a criminal charge." *Id.* at 49a. It also noted, however, that "the government may rely on acts 'causally or incidentally related to legislative affairs but not part of the legislative process itself.'" *Ibid.* (quoting *United States* v. *Brewster*, 408 U.S. 501, 528 (1972)).

The district court found that "[t]he grand jury record * * * discloses no infringement of the Speech or Debate Clause in the issuance of the indictment." Pet. App. 50a. The court concluded that "the schemes and facts alleged" in the indictment "do not concern [petitioner's] involvement in the consideration and passage or rejection of legislation," and it observed that "the grand jury record reviewed focused sharply on these allegedly criminal non-legislative actions." *Ibid.* The court acknowledged that "the grand jury materials submitted for review do contain references to [petitioner's] status as a congressman and as a member of various congressional committees," but it concluded that such references "do[] not offend the Speech or Debate Clause" so long as "neither the indictment nor the prosecution entails inquiry into [petitioner's] participation in the consideration and passage of legislation." *Id.* at 50a-51a (citing *United States* v. *McDade*, 28 F.3d 283 (3d Cir. 1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995)).

The district court also held that none of the three excerpts identified by petitioner "constitute an infringe-

ment of the Speech or Debate Clause that would require dismissal of the indictment." Pet. App. 56a. The court determined that the prosecutor's remark about petitioner's "activities in Congress" when questioning Butler had involved petitioner's "influence and status" and that those matters were "only incidentally related to [petitioner's] past legislative activities" and "may [have] be[en] relevant to the motivation some persons may have [had] to bribe [petitioner]." *Id.* at 52a-53a. The court concluded that "Spence's reference to the AGOA was not a reference to [petitioner's] involvement in the consideration and passage of [that legislation]," but rather was "another aspect of [petitioner's] status and experience that might induce persons to offer him bribes in return for official acts." *Id.* at 53a-54a.

The district court also found that Collins's reference to petitioner's "participation in 'moving the [AGOA] through the Congress'" was "no infringement of [the Speech or Debate] Clause." Pet. App. 55a. The court explained that Collins's "reference to [petitioner's] role in securing passage of the AGOA is neither material nor relevant to the criminal conduct alleged in the indictment" and that petitioner "is not being questioned in the proceeding about his vote or role in the AGOA legislation." *Ibid.* The court also stated that "a reference to privileged activity does not render an indictment—or a grand jury proceeding—constitutionally infirm, provided there are independent, non-privileged grounds sustaining the charges in the indictment." *Ibid.* (citing *McDade*, 28 F.3d at 300). Finally, the court observed that "Collins's statement was unprompted," "did not result from an inquiry into [petitioner's] legislative activities," and "did not result in any further inquiry into

legislative activities by the [prosecutor] or the grand jury." *Id.* at 55a-56a.

3. Petitioner appealed the district court's order denying his motion to dismiss the indictment. Pet. App. 2a; see *Helstoski* v. *Meanor*, 442 U.S. 500, 507-508 (1979) (stating that a district court's denial of a motion to dismiss an indictment on Speech or Debate Clause grounds is immediately appealable under the collateral order doctrine).

The court of appeals affirmed. Pet. App. 1a-32a. The court first rejected petitioner's claim that *United States* v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994), holds that "*any* mention of Speech or Debate Clause material in a grand jury proceeding mandates the dismissal of all charged offenses that relate to such evidence." Pet. App. 23a. The court of appeals concluded that petitioner's reliance on *Swindall* was "misplaced," because *Swindall* had involved a situation where "[t]he government [had] used [the defendant's] legislative activities to prove an element of the perjury offense" and had conceded that the defendant's "legislative activities were 'critical' to the prosecution." *Id.* at 24a-25a & n.7. In contrast, the court explained, petitioner "has not contended that the Indictment references his legislative acts, or that a successful prosecution will require the government to prove such acts." *Id.* at 25a.

The court of appeals stated that it "agree[d]" with the district court's view "that the controlling authorities did not compel" the sort of "comprehensive review" of grand jury materials that the district court permitted and conducted in this case. Pet. App. 31a. The court explained that "[t]he principle of grand jury independence is firmly rooted and jealously protected in our fed-

eral system of justice," *id.* at 25a, and that, as a result, "a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege," *id.* at 26a (citing, *inter alia*, *Costello* v. *United States*, 350 U.S. 359, 363 (1956)). The court of appeals noted that it had previously held "that a grand jury will not be deemed biased solely because it heard some evidence related to congressional speech," and it concluded that it was "not entitled to review the grand jury record in [petitioner's] case [because] the Indictment simply does not question any legislative acts." *Id.* at 28a (citing *United States* v. *Johnson*, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970)). The court noted that two other courts of appeals had "observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment." *Id.* at 30a n.8 (citing *United States* v. *Kostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir.), supplemented, 68 F.3d 489 (D.C. Cir. 1995), and *United States* v. *Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980)). The court of appeals stated that it had "no reason to reach such an issue" in this case, however, because petitioner "ha[d] made no such assertion." *Id.* at 31a n.8.

The court of appeals stated that, "[i]n these circumstances, we are satisfied that the district court, in conducting the pretrial proceedings, accorded [petitioner] every substantive and procedural protection to which he was entitled." Pet. App. 31a. The court of appeals noted that, having decided "to analyze the [three] Excerpts [identified by petitioner] and review *in camera* certain grand jury materials," the district court "concluded that the grand jury had not considered any Speech or Debate

material." *Ibid.* The court of appeals stated that, "[u]nder the facts of this case," the district court's actions had been "within its discretion and entirely appropriate." *Ibid.* The court also stated that, "[w]ith the foregoing principles in mind," it was "content to reject [petitioner's] request for further review of the grand jury record." *Ibid.*

4. Petitioner filed a petition for rehearing en banc. That petition was denied after no judge requested a vote on it. Pet. App. 33a. Petitioner's trial is scheduled to begin on May 26, 2009. No. 1:07cr209 (E.D. Va. Jan. 15, 2009).

ARGUMENT

Petitioner contends (Pet. 13-33) that the facially valid indictment in this case must be dismissed because Speech or Debate Clause material was presented to the grand jury. The court of appeals' interlocutory decision is correct and does not conflict with the decisions of this Court or of another court of appeals. Further review is not warranted.

1. As an initial matter, petitioner substantially overstates the court of appeals' holding. Contrary to petitioner's assertions, the court of appeals did not hold that a Member of Congress "*cannot* challenge an indictment on" the ground that the government presented Speech or Debate Clause material to the grand jury. Pet. 13 (emphasis added).

To the contrary, the court of appeals expressly acknowledged that other courts had suggested that a Member who makes a sufficiently compelling showing that a Speech or Debate Clause violation occurred before a grand jury might be entitled to dismissal of an indictment on that ground and it left that question open. See Pet. App. 30a-31a n.8. In addition, although the

court of appeals stated that the district court had accorded petitioner's Speech or Debate Clause claim a more "comprehensive review" than was required, *id.* at 31a, the court of appeals did not state that such claims never warrant review. Finally, the court of appeals' conclusion (*ibid.*) that the district court acted "within its discretion" in deciding to analyze the excerpts from the grand jury transcript identified by petitioner and to review other portions of the transcript *in camera* is directly at odds with the notion that the principle of grand jury independence categorically bars any review of a grand jury proceeding to determine whether the indictment rested on Speech or Debate Clause material. For that reason, petitioner's contention (Pet. 22) that the court of appeals' "decision places no check on a prosecutor's ability to introduce privileged legislative materials in the grand jury" is unfounded.

2. For the reasons explained above, the court of appeals' opinion is properly understood as holding that, regardless of whether there may be circumstances in which a Speech or Debate Clause violation before a grand jury could warrant dismissal of a facially valid indictment, those circumstances are not present in this case. That holding is correct.

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The purpose of the Speech or Debate Clause is to ensure that Members of Congress can perform their legislative duties without fear that they will be sued or prosecuted for them. See *United States* v. *Johnson*, 383 U.S. 169, 180-181 (1966). The Speech or Debate Clause "does not purport to confer a general exemption upon Members of Congress from liability or process in

criminal cases." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972). Rather, it protects only those activities that are "an integral part of the deliberative and communicative processes by which Members participate" in their constitutionally-mandated duties. *Id.* at 625. Accordingly, a Member may be prosecuted for a crime provided that "the Government's case does not rely on legislative acts or the motivation for legislative acts." *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In particular, the Court has made clear that the Speech or Debate Clause does not apply to the "wide range of legitimate 'errands'" that Members routinely perform for their constituents as part of their job but that are not legislative acts. *Ibid.* Nor does the Clause prohibit "proof of legislative status, including status as a member or ranking member of a committee." *United States* v. *McDade*, 28 F.3d 283, 289 (3d Cir. 1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995).

Petitioner does not contend that the indictment in this case refers to any legislative acts or that the government will have to rely on such acts at trial in order to prove any allegation in the indictment. Rather, the indictment charges petitioner with repeatedly soliciting bribes in return for the performance of *non-legislative* acts—*i.e.*, precisely the type of "'errands' performed for constituents" that this Court held in *Brewster* are not protected by the Speech or Debate Clause. 408 U.S. at 512.

Petitioner asserts (Pet. 29) that "[t]here is no doubt that evidence of legislative activity within the meaning of the Speech or Debate Clause was introduced in the grand jury in this case." But, as the court of appeals noted, "the [district] court concluded that the grand jury had not *considered* any Speech or Debate Clause mate-

rial." Pet. App. 31a (emphasis added). Although the court of appeals did not expressly state that it agreed with that conclusion, it did state that it was "satisfied that the district court * * * accorded [petitioner] every substantive and procedural protection to which he was entitled," and that it was "content to reject [petitioner's] request for *further* review of the grand jury record." *Ibid.* (emphasis added).

At any rate, petitioner's claim that the grand jury heard some information that is covered by the Speech or Debate Clause does not warrant dismissal of the indictment. Out of more than 600 pages of grand jury transcripts that covered all of the testimony of his current and former congressional aides, petitioner relies in this Court (Pet. 29-31) on a single answer given by his former chief of staff, Lionel Collins.[1] The prosecutor asked Collins the following question: "And so what kind of relationship did [petitioner] have with government officials in Nigeria?" C.A. App. 181. In answering that question, Collins first stated that African leaders were "thankful to [petitioner] for basically being in the forefront of bringing about democracy in Nigeria." *Id.* at 182. Without any further questioning by the prosecutor, Collins then described a 1997 trip that petitioner took to Africa and stated that "the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa. [Petitioner] was very instrumental in moving the legislation through the Congress, and it was voted on by the House

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[1] Petitioner makes only passing references (see, *e.g.*, Pet. 7, 9) to the Spence and Butler excerpts in his petition for a writ of certiorari. In any event, the district court correctly found that neither of those excerpts contained any Speech or Debate Clause material. Pet. App. 51a-54a.

and Senate side. It passed." *Ibid.* Collins went on to connect this piece of legislation to petitioner's familiarity with various "African leaders" who were "thankful" to him and to petitioner's reputation as a Member whose "specialty was international trade and, in particular, Africa." *Ibid.*[2]

Although Collins referred in his testimony to petitioner's performance of a legislative act (helping move the AGOA through Congress), that reference did not require dismissal of the indictment. First, as the district court found, Pet. App. 16a, 55a-56a, the reference was unsolicited, because the prosecutor's question— "what kind of relationship did [petitioner] have with government officials in Nigeria?" C.A. App. 181—did not seek testimony about any legislative act. See *United States* v. *Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (rejecting Speech or Debate Clause claim in part because the government "did not initiate the exploration of" the Member's legislative act; rather, the act "was first mentioned by [the Member's] aide in a volunteered statement"), cert. denied, 489 U.S. 1052 (1989).

Second, the district court correctly concluded that Collins's isolated and unsolicited reference to the enactment of AGOA was "neither material nor relevant to the *criminal conduct* alleged in the indictment." Pet. App. 55a (emphasis added). The federal bribery statute, 18 U.S.C. 201(b)(2)(A), makes it a crime for a public official, with a corrupt intent, to solicit or receive a bribe in return for being influenced in the performance of an official act. As reflected in the indictment and discussed

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[2] At the conclusion of this testimony, the prosecutor asked Collins: "So it's an understatement to say [petitioner] was very influential with high-ranking government officials in Nigeria?," and Collins answered in the affirmative. C.A. App. 183.

above, the government's case against petitioner in the grand jury rested on evidence of numerous solicitations of bribes by petitioner and a wide variety of non-legislative official acts that petitioner allegedly performed in return for bribes, including meeting repeatedly with government officials in Africa. The question of how petitioner initially came to have relationships with the African officials—which occurred years before the commencement of the charged conduct—certainly was not the conduct for which petitioner was "being questioned in th[e] proceeding." Pet. App. 55a.

Third, the government's case in the grand jury did not, in any sense, "rely," *Brewster*, 408 U.S. at 512, or "depend[]," *Johnson*, 383 U.S. at 184, on the unsolicited reference to a single legislative act. The criminal acts were (and must be) established without reference to legislative activity in which petitioner engaged. Accordingly, that tangential reference did not "subject [petitioner] to liability" in violation of the Speech or Debate Clause. *United States* v. *Swindall*, 971 F.2d 1531, 1548 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994); accord *United States* v. *Myers*, 635 F.2d 932, 941 n.10 (2d Cir.) (declining to consider claim that Speech or Debate Clause material was presented to the grand jury, because the defendant had failed to show that "the grand jury [lacked] sufficient competent evidence to establish probable cause"), cert. denied, 449 U.S. 956 (1980); *United States* v. *Johnson*, 419 F.2d 56, 58-59 (4th Cir. 1969) (rejecting Speech or Debate Clause challenge to certain counts even though protected material constituted a "substantial part" of the evidence the grand jury

heard), cert. denied, 397 U.S. 1010 (1970).[3] Especially in light of the principle of grand jury independence and the presumption of regularity that attaches to grand jury proceedings, see *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in the judgment); *Costello* v. *United States*, 350 U.S. 359, 362 (1956); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943), petitioner would have needed to make a far stronger showing in order to raise the question of whether, and under precisely what circumstances, Speech or Debate Clause violations before a grand jury could potentially warrant the dismissal of a facially valid indictment.

3. Petitioner has failed to demonstrate that the court of appeals' decision rejecting his Speech or Debate Clause claim conflicts with the decisions of another court of appeals. The court of appeals specifically distinguished each of the three court of appeals decisions with which petitioner asserts a conflict. Compare Pet. 15-20,

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[3] Petitioner's assertion (Pet. 32 n.10) that "[i]t cannot be concluded that the grand jury did not rely on this evidence or treat it as important when the prosecutors' colloquies with and instructions to the grand jury were not provided for the court for review" is without merit. As the D.C. Circuit has explained, "the burden of proof is the other way round: the Member must show that the Government has relied upon privileged material." *United States* v. *Rostenkowski*, 59 F.3d 1291, 1300, supplemented, 68 F.3d 489 (1995). As both the district court (Pet. App. 44a n.7) and the court of appeals (*id.* at 11a n.5) explained, any such colloquies and instructions were not transcribed and were not available for inspection. Nor did petitioner provide any threshold basis for thinking that those materials would support a Speech or Debate claim. To the extent that petitioner can be understood to challenge the justification for not transcribing those portions of the grand jury record, that fact-bound claim would not merit this Court's review.

with Pet. App. 23a-24a & n.7, 30a n.8.[4] In addition, petitioner has failed to identify any case in which a court of appeals ordered dismissal of an indictment because of a grand jury witness's isolated and unsolicited reference to a legislative act bearing on an incidental matter.

There is no conflict between the court of appeals' decision in this case and *United States* v. *Rostenkowski*, 59 F.3d 1291 (D.C. Cir.), supplemented, 68 F.3d 489 (D.C. Cir. 1995). *Rostenkowski* did not order the dismissal of an indictment based on a Speech or Debate Clause violation. To the contrary, *Rostenkowski* held that a district court had not erred in refusing to conduct any *in camera* review of the grand jury materials in that case. *Id.* at 1294, 1300-1301. In concluding that it had jurisdiction to consider the defendant's interlocutory appeal under the collateral order doctrine, the D.C. Circuit did hold that "*at some point* the presentation of [Speech or Debate Clause] material [to a grand jury] requires the court to dismiss the resulting bill," and it observed that "[e]ven the Government seems willing to concede that *pervasive* violations of the Speech or Debate Clause before the grand jury would invalidate the indictment." *Id.* at 1299 (emphasis added); see *id.* at 1300 ("[W]e conclude that *at least under some circumstances* the Speech or Debate Clause prohibits not only reference to protected material on the face of the indictment but also the use of that material before the grand jury.") (emphasis added). But the *Rostenkowski* court also made clear that it "express[ed] no view upon the question of *when* the presentation of Speech or Debate

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[4] Petitioner's reliance (Pet. 14 n.6) on a 15-year-old unpublished district court decision does not merit this Court's review.

Clause material to a grand jury invalidates a facially valid indictment." *Id.* at 1298-1299 (emphasis added).

In this case, the court of appeals expressly left open the possibility that at some point the presentation of Speech or Debate Clause material to a grand jury may require dismissal of a facially valid indictment. Pet. App. 30a n.8. In addition, *Rostenkowski* had no occasion to—and did not—decide whether the sort of fleeting and unsolicited statements at issue in this case would require dismissal of such an indictment. As a result, the court of appeals' decision in this case does not conflict with *Rostenkowski*.[5]

There is likewise no conflict with *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980). In *Helstoski*, the district court had reviewed the grand jury transcripts, including Congressman Helstoski's own testimony. *Id.* at 202. Based on that review, the district court had found that "the evidence violating the speech or debate clause was so extensive that it completely infected those proceedings," *ibid.*, had "permeated the entire grand jury process," *ibid.*, and "was a substantial factor underlying the indictment," *id.* at 204. The *Helstoski* court thus framed the question before it as "whether, despite *wholesale violation* of the speech or debate clause be-

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[5] Petitioner quotes language from *Rostenkowski* that expressed concern about a prosecutor "procur[ing] an indictment by inflaming a grand jury against a Member upon the basis of his Speech or Debate, subject only to the necessity of avoiding any reference to the privileged material on the face of the indictment." Pet. 16 (quoting *Rostenkowski*, 59 F.3d at 1298); see Pet. 25. Before the district court, however, petitioner acknowledged that he was not asserting that anything of that sort occurred here. C.A. App. 262 (defense counsel stating: "[W]hen I talked about the possibility of Speech or Debate material being used to inflame a grand jury, that was in response to the [district] [c]ourt's hypothetical. That is not what we say happened here.")

fore a grand jury, an indictment based on the evidence can survive," *id.* at 205 (emphasis added), and it concluded that dismissal of certain counts was required under those circumstances, *id.* at 206.

As the court of appeals correctly observed in this case (Pet. App. 30a n.8), petitioner has neither alleged nor shown that Speech or Debate Clause violations "permeated the whole [grand jury] proceedings." *Helstoski*, 635 F.2d at 205. As a result, the court of appeals had "no reason to"—and did not—"reach such an issue." Pet. App. 31a n.8.

Finally, the court of appeals' decision in this case does not conflict with the Eleventh Circuit's decision in *Swindall*. As the court of appeals correctly explained (Pet. App. 23a-25a), in *Swindall*, "Speech or Debate material was used as critical evidence leading to [Congressman Swindall's] indictment" and subsequent conviction. *Swindall*, 971 F.2d at 1547; see Pet. App. 24a-25a (explaining that the government "used [Congressman Swindall's] legislative activities to prove an element of the perjury offenses" with which he was charged); *Swindall*, 971 F.2d at 1549. The *Swindall* court also concluded that Congressman Swindall had been "subjected to improper questioning before the grand jury" and that "the decision to indict was inextricably linked to the grand jury's impressions of Swindall's answers to improper questions." *Ibid.* The court stated that "[t]he AUSA's impermissible questioning of Swindall before the grand jury eliminate[d] any doubts about the appropriateness of dismissal that might have lingered had the AUSA merely introduced evidence of Swindall's committee memberships." *Id.* at 1549-1550.

As the court of appeals correctly explained, petitioner's "reliance on the *Swindall* decision is misplaced."

Pet. App. 24a. Petitioner "has not contended that the Indictment refers to his legislative acts, or that a successful prosecution will require the government to prove such acts." *Id.* at 25a. In addition, petitioner did not testify before the grand jury, so there can be no contention that he was personally subjected to improper questioning, much less improper questioning that could have influenced the grand jury's decision to indict.[6] The court of appeals' decision thus does not conflict with *Swindall*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009

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[6] *Swindall* also emphasized that an indictment need not invariably be dismissed when a "grand jury considers improper Speech or Debate material" and stated that "[i]f reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability." 971 F.2d at 1548. As the district court correctly explained (Pet. App. 55a), even if some of the material in the Collins's excerpt constituted Speech or Debate Clause material, the material in question was "neither material nor relevant to the criminal conduct alleged in the indictment," and thus could not have affected the decision to indict.

1260

No. 08-1059

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. JEFFERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This Court has never addressed the important constitutional issue raised by this case: whether the use of privileged Speech or Debate material in the grand jury may be grounds for dismissing a facially valid indictment of a Member of Congress. The Fourth Circuit, relying on *Costello v. United States*, 350 U.S. 359 (1956), as controlling precedent, answered this question no. Three other circuits, expressly rejecting the application of *Costello* in the Speech or Debate context, have answered yes. Nevertheless, the government urges this Court to deny review, arguing that petitioner has overstated the holding below and that no actual conflict exists, and further that there was no meaningful Speech or Debate violation here in any event. The government's position cannot be squared with the language of the Fourth Circuit's opinion or the facts of this case.

1. In its effort to deny a circuit conflict, the government resorts to rewriting the opinion below. It asserts that "the court of appeals' opinion is properly understood as holding that, regardless of whether there may be circumstances in which a Speech or Debate Clause violation before a grand jury could warrant dismissal of a facially valid indictment, those circumstances are not present in this case." Opp. at 12. It further asserts that the court of appeals left open the question of whether a "sufficiently compelling" showing of a Speech or Debate violation in the grand jury might warrant dismissal of an indictment. Opp. at 11. But these assertions are rebutted by the opinion itself, which

repeatedly states that violation of a constitutional privilege in the grand jury *cannot* be grounds for invalidating a facially valid indictment.

The Fourth Circuit began its analysis by citing *Costello* and *United States v. Calandra*, 414 U.S. 338 (1974), for the proposition that: "Under controlling precedent, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege." App. 26a. The court described *Costello* as holding that, "when an indictment is facially valid and the grand jury was 'legally constituted and unbiased,' the competency and adequacy of the evidence presented to it is not subject to challenge," App. 27a, and stated that, "We have consistently adhered to *Costello's* guiding and settled principles." *Id.*

The court then recounted its previous application of the *Costello* rule in *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), where, "in a context not unlike that presented here, we concluded that the *Costello* mandate barred us from looking behind an indictment to assess whether the grand jury had considered privileged legislative materials." App. 27a-28a. The court noted that in *Johnson*, it rejected the claim that grand jury bias could arise from the grand jury's receipt of constitutionally-impermissible evidence – foreclosing bias as an avenue for examination of the use of Speech or Debate material in the grand jury. In distinguishing *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973), on which the defense relied below, the court

said: "Importantly, *Dowdy* did not purport to circumvent *Costello* and its progeny, or to rule that a court should look behind an otherwise valid indictment for Speech or Debate Clause materials that may have been presented to a grand jury." App. 30a. The court stated its holding plainly: "Bounded by such precedent, we are likewise not entitled to review the grand jury record in Jefferson's case – the Indictment simply does not question any legislative acts." App. 28a.

By the court's own terms, therefore, it determined that it was "*barred* ... from looking behind an indictment" and "*not entitled* to review the grand jury record" (emphasis added). Measured against the Fourth Circuit's language, the government's version of the court's holding – that in appropriate circumstances, a Speech or Debate violation in the grand jury could be grounds for dismissal of an otherwise valid indictment – misstates the ruling below. Surely, if the Fourth Circuit had intended to say what the government says it said, it would have done so at least as clearly as the government's opposition brief does.

Because it cannot find support for its view of the holding in the opinion's clear language, the government instead relies on its interpretation of several brief passages from the end of the decision, neither of which bears the weight assigned by the government. The government first points to footnote 8, in which the court noted that, "At least two of our sister circuits have observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment. ... Jefferson has made no such assertion,

however, and we have no reason to reach such an issue." App. 30a, n.8 (emphasis original). This footnote obviously does not indicate that the Fourth Circuit would agree that a pervasive violation could be grounds for dismissing an indictment. In fact, that possibility would be entirely inconsistent with the court's clear statement that it was not entitled to look at the evidence behind the indictment. Indeed, in *United States v. Johnson*, the protected legislative material did constitute "a substantial part" of the evidence heard by the grand jury, but the Fourth Circuit rejected the claim that its introduction invalidated the indictment. 419 F.2d at 59.[1]

Seeking additional support for its version of the holding, the government points to the Fourth Circuit's discussion of the district court's review of the record. There, after noting that the district court examined the grand jury transcripts "out of an abundance of caution," the Fourth Circuit commented: "The court acknowledged, however – and we agree – that the controlling authorities did not compel such a comprehensive review. ... Under the facts of this case, however, the court's decision to act as it did in assessing Jefferson's Speech or Debate Clause claim was within its discretion and entirely appropriate." App. 31a. But the government's claim that this passage reflects a

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[1] The Fourth Circuit's ruling cannot be upheld on the ground that the violation was not "pervasive" in any event. The prosecutors' colloquies with and instructions to the grand jury were never transcribed or reviewed, so it is impossible to assess how much emphasis was placed upon the staffer's testimony about Mr. Jefferson's influence with African officials.

holding that Speech or Debate violations in the grand jury may be grounds for dismissing an indictment is, at best, strained and unconvincing. Given the Fourth Circuit's analysis, its reliance on *Costello*, and most importantly its articulation of its ruling – that it was *not entitled to review the grand jury record* when the indictment did not question any legislative acts – the only logical reading of this portion of the opinion is that it simply means that the trial court, which found no Speech or Debate violations and refused to dismiss the indictment, did not err merely by looking at the grand jury record. Certainly it does not say that the trial court could have dismissed the indictment had it recognized a Speech or Debate violation in the grand jury.

2. Once the government's inaccurate characterization of the court of appeals' holding is set aside, its claim that there is no conflict with *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980), and *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), can be disposed of. The government acknowledges that *Rostenkowski* held that "at least under some circumstances the Speech or Debate Clause prohibits not only reference to protected material on the face of the indictment but also the use of that material before the grand jury." 59 F.3d at 1300. The government insists that this creates no conflict, however, because *Rostenkowski* did not define *when* dismissal would be required. But *Rostenkowski* does not confine the circumstances under which an indictment would be invalidated to "pervasive" violations, which even under the government's inaccurate interpretation is the only

possibility left open by the Fourth Circuit's decision. More importantly, *Rostenkowski* concludes that the use of Speech or Debate material in the grand jury may require dismissal of a facially valid indictment, while the Fourth Circuit held that it was barred from considering such a claim.

This conflict is further apparent from the courts' different treatment of *Costello* and *Calandra* – an issue that the government's brief does not even address. *Rostenskowski* specifically distinguished the very precedents upon which the Fourth Circuit relied. The D.C. Circuit found that *Costello* and *Calandra*, which hold that a facially valid indictment may not be challenged on the ground that constitutionally improper evidence was introduced in the grand jury, did not apply to challenges based on the use of Speech or Debate material. *See* 59 F.3d at 1298. *Rostenkowski* also noted that *Calandra* did not preclude a challenge when what was occurring in the grand jury was itself a constitutional violation – and that "it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 59 F.3d at 1298. The Fourth Circuit, by contrast, held that *Costello* was *controlling*, and refused to address the concept of a Speech or Debate violation in the grand jury at all.

Further, the fact that the court in *Rostenkowski* did not have occasion to decide *when* the use of Speech or Debate evidence in the grand jury would invalidate an indictment does not obviate the clear conflict between *Rostenkowski* and the Fourth Circuit on the governing legal issue: whether

a facially valid indictment is ever subject to dismissal on Speech or Debate grounds.[2]

For similar reasons, the conflict with *United States v. Helstoski* is real. *Helstoski* rejected the application of *Costello* and *Calandra* in the Speech or Debate context, and expressly held that use of legislative evidence in the grand jury was grounds for invalidating an indictment. While the government claims that the Fourth Circuit left open the proper treatment of a case where there were pervasive violations, as in *Helstoski*, this claim is unfounded for the reasons discussed above.

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[2] In discussing why a court must have the power to look behind a facially valid indictment, *Rostenkowski* offered as an example the fact that if it did not, a prosecutor might, with impunity, inflame a grand jury through use of Speech or Debate evidence that does not appear in the indictment. The government notes that during the motions hearing, the defense acknowledged that it was not arguing that the prosecutors had inflamed the grand jury here. Opp. at 19 n.5. But this point has no relevance. *Rostenkowski* does not suggest that inflaming the grand jury is the only use of Speech or Debate evidence that could be grounds for invalidating an indictment. While in this case there is no argument that the government employed evidence of unpopular or controversial positions adopted by Mr. Jefferson to stir the grand jurors' passions, its use of privileged evidence was even more problematic. The government expressly relied on evidence of Mr. Jefferson's legislative activities to establish its core theory on the bribery counts: that Mr. Jefferson had valuable influence which he offered in return for payment. Moreover, under the Fourth Circuit's formulation, in direct contrast to *Rostenkowski*, the possibility that the prosecutors had inflamed the grand jury with Speech or Debate evidence would not be grounds for reviewing the grand jury record in any event.

Finally, although the Fourth Circuit distinguished *Swindall*, its distinction was based on a misreading of that case. The Fourth Circuit asserted that *Swindall* was only concerned with the introduction of evidence at trial. App. 24a-25a. But *Swindall* unmistakably holds that use of Speech or Debate evidence *in the grand jury* is grounds for invalidating an indictment. *See* 971 F.2d at 1546-47. Moreover, while the government points to the fact that Swindall himself was questioned before the grand jury, the Eleventh Circuit did not find that fact necessary to its conclusion that the Speech or Debate Clause had been violated. *See* 971 F.2d at 1549. Nor was it necessary to its conclusion that an indictment may be dismissed where legislative material relevant to the decision to indict is used in the grand jury and therefore exposes a Member of Congress to liability. *Id.* at 1548.

Thus, contrary to the government's assertions, the Fourth Circuit's holding that it was barred from considering Speech or Debate violations in the grand jury in this case because the indictment was facially valid is in direct conflict with the decisions of the other circuits that have considered this issue.

But even if there technically were no conflict – which petitioner strongly disputes – this case would still warrant review on certiorari. It raises an important constitutional question concerning the scope of the Speech or Debate Clause's protections in the grand jury context that has not been, but should be, settled by this Court. There is little doubt that in any subsequent prosecution of a Congressman, a court in the Fourth Circuit faced with a challenge to use of Speech or Debate material in the grand jury

would read the Fourth Circuit's opinion to preclude it from considering that challenge. Prosecutors in that circuit will therefore be free to use privileged legislative material to support their case and persuade the grand jury to indict, and the defendant Member will have no recourse – a result fundamentally at odds with this Court's strong statement that the Speech or Debate privilege is "absolute." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

3. Review is also important here because the Fourth Circuit's refusal to look behind the indictment to consider Mr. Jefferson's claim allowed a violation of the Speech or Debate Clause to go unremedied. In arguing otherwise, the government first relies on the Fourth Circuit's statement that the trial court "concluded that the grand jury had not considered any Speech or Debate Clause material." Opp. at 13 (emphasis omitted). But the Fourth Circuit was simply wrong. Lionel Collins testified about Mr. Jefferson's activities in connection with the passage of the African Growth and Opportunity Act ("AGOA"), a major African trade bill, and testified that those activities were the source of Mr. Jefferson's influence with African leaders. In considering this testimony, the trial court stated that, "While a Member's role in passing legislation is the sort of legislative activity protected by the Clause, the reference cited here is no infringement of the Clause." App. 55a. In other words, the trial court recognized that Speech or Debate material *was presented* to the grand jury, but nevertheless declined to find that the Clause had been violated. Indeed, the government itself admits that the grand

jury heard Speech or Debate evidence: "... Collins referred in his testimony to petitioner's performance of a legislative act (helping move the AGOA through Congress)." Opp. at 15.

The government's assertion that Collins' testimony can be ignored as unsolicited is rebutted by the fact that the government interviewed Collins before putting him in the grand jury and knew how he would respond to a question about Mr. Jefferson's relationships with African officials. In addition, the prosecutors' follow-up questions emphatically and directly tied Mr. Jefferson's work on the passage of the AGOA legislation to his influence with African officials.

The government also argues that the district court correctly concluded that Collins' testimony was not material or relevant to the criminal conduct alleged in the indictment. But the fact that the indictment does not charge the defendant with crimes based on his activities during the passage of AGOA has no bearing here. Collins' testimony, as elicited by the prosecutors, established that Mr. Jefferson had significant influence with African officials in part as the result of his legislative activities. The bribery-related counts in the indictment all depend on the allegation that Mr. Jefferson accepted things of value from businesses seeking projects in Africa in return for using his influence with African leaders on behalf of those businesses. The government does not rebut petitioner's argument that proof that Mr. Jefferson *possessed* influence – which was established by introduction of his legislative acts – supported the government's theory that Mr. Jefferson was *selling*

influence. And because of the Fourth Circuit's approach to the issue, it did not review the district court's conclusions in this regard.

Finally, the government argues that its case in the grand jury did not "rely" or "depend" on Speech or Debate material because there was sufficient other evidence of the alleged criminal acts. Opp. at 16. But the government offers no way to separate the impact of the privileged legislative material used in the grand jury from that of the other evidence introduced by the government.[3] In *Dowdy*, the Fourth Circuit itself found that convictions obtained at trial had to be set aside where the "erroneously admitted evidence of legislative acts was arguably relevant to proof of bribery, and we cannot confidently say that the jury did not consider it in finding guilt." 479 F.2d at 227. Applying that standard to the grand jury evidence here would require dismissal of the 14 bribery-related counts in the indictment.

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3 Although the government cites *Rostenkowski* for the proposition that the defense bears the burden of proof on this issue (Opp. at 17 n.3), the cited quotation relates to a different question: whether the government must prove that it has an independent source of information for its trial evidence in a case against a Member. 59 F.3d at 1300. But *Rostenkowski* itself states that in response to a challenge at the pre-trial stage, the government must show "that the indictment is valid under the Speech or Debate Clause – both on its face and, as we have held, in its provenance." *Id.* Moreover, neither the defendant nor any court has seen the entire record of the grand jury proceedings, so no court could determine if the material was relied on or not.

For the reasons set forth above and in the petition, the petition should be granted.

Respectfully submitted,

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